Supreme Court, U.S.
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80-518

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC.

and

INSURANCE COMPANY OF NORTH AMERICA

Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

RALPH RILEY

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RICHARD W. GALIHER, JR.
1215 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8330

Attorney for Petitioners

Of Counsel:

GALIHER, CLARKE, MARTELL
& DONNELLY
1215 Nineteenth Street, N.W.
Washington, D.C. 20036

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QUESTIONS PRESENTED

1. Whether there is any statutory requirement under the Longshoremen's and Harbor Workers' Compensation Act for a claimant to prove the occurrence of an "accidental injury arising out of and in the course of employment" (33 U.S.C. 902(2)).

2. Whether the statutory presumption under 33 U.S.C. 920(a) can properly be applied in the claimant's favor, when there was substantial evidence of record before the Court below to rebut the statutory presumption, and affirm the findings of the Administrative Law Judge and Benefits Review Board.

PARTIES BELOW

In the Court below, the Petitioners were Respondents. The Respondent Ralph Riley was Petitioner in the Court below and Respondent Director, Office of Workers' Compensation Program, U.S. Department of Labor, was Intervenor in the Court below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Federal Sheet Metal/U.S. Industries and Insurance Company of North America respectively pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS AND JUDGMENT BELOW

The opinion of the Court of Appeals, not yet officially reported, denying the Petition for Rehearing, dated July 3, 1980, is set forth as Appendix A hereto. The opinion of the Court of Appeals denying Suggestion for Rehearing En Banc dated July 3, 1980, not yet officially reported is set forth as Appendix B hereto. The Court of Appeals decision is unreported and is attached hereto as Appendix C. The unreported decision of the Benefits Review Board is set forth as Appendix D hereto. The unreported decision of the Administrative Law Judge is attached hereto as Appendix E.

JURISDICTION

The decision of the Court of Appeals was entered on May 22, 1980. The order of the Court of Appeals denying the Petitions for Rehearing and for Suggesting Rehearing En Banc was entered on July 3, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

District of Columbia Code:

§ 36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.

> The provisions of chapter 18 of Title 33 U.S.Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every per-

son carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

United States Code, Title 33:

§ 902. *Definitions*

When used in this chapter—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

§ 903. *Coverage*

(a) Compensation shall be payable under this Chapter in respect of disability or death of an employee, but only if the disability or death results from an injury. . . .

§ 920. *Presumption*

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

March 4, 1927, c.509, § 20, 44 Stat. 1436.

STATEMENT OF THE CASE

On November 20, 1975, the Respondent Ralph Riley, awoke at home about 2:30 a.m. feeling sweaty, tight in his chest and with pain in both arms. He was taken by his wife to LaPlata Hospital, about thirteen miles away, where he was admitted until November 25, 1975. No history of injury on the job was given by wife or husband to the hospital or to any of the physicians who treated him in the hospital, including Dr. Henry Burke or Dr. Alvaro Sanchez, an orthopedic who treated him during his hospital stay. Initially he had been admitted to the Coronary Care Unit of the hospital to rule out myocardial infarction, but by the time of discharge the diagnosis was cervical arthritis, and he was referred for further care to his private physician, Dr. Herbert Wisotsky. Dr. Wisotsky had been treating Ralph Riley for arthritis since 1970. He had hospitalized Riley at Cafritz Hospital, Washington, D.C., in 1970 where X-rays had confirmed arthritic changes. Since May, 1975, Mr. Riley had been again under Dr. Wisotsky's active care for arthritis when he had been "off work" because of neck, shoulder and arm pains. Prior to November, 1975, Dr. Wisotsky had discussed retirement with Riley because of his cervical arthritis and prescribed medication to him for treatment of the arthritis. Dr. Wisotsky did not see Mr. Riley in the hospital in November but saw him December 1, 1975 for "anxiety".

There was no mention at all to Dr. Wisotsky on that first visit since July, of the injury on the job causing the November hospitalization. Dr. Wisotsky saw him again on December 5 and referred him to Dr. Scalettar and Dr. Maguigad, other consultants who also examined him in December. There was no mention by Mr. Riley to these physicians who examined him at that time (and their reports are in evidence) of any on-the-job occurrence or incident of increased arthritic pain.

On December 19, 1975, Mr. Riley saw Dr. Sanchez, who had previously examined him at LaPlata Hospital during his November admission there. On that date, Respondent Riley told Dr. Sanchez that he had "strained" his neck when moving duct work at Walter Reed Hospital on November 19, 1975. On December 29, 1975, the Respondent Riley retained counsel who filed a claim for Workers' Compensation with the U.S. Department of Labor under the D.C. Workers' Compensation Act, 36 D.C. Code § 501. On this claim form he alleged that an "accident" occurred when he was "lifting duct work weighing approximately 500 pounds and felt a sharp pain in my neck". On July 16, 1976 he also filled out a claim form for the Respondent U.S. Industries/Federal Sheet Metal and their Insurer Respondent Insurance Company of North America asserting he had "struck his neck and shoulders on duct work".

Prior to November 20, 1975, Mr. Riley had been employed by the Respondent U.S. Industries/Federal Sheet Metal at Walter Reed Hospital for approximately three weeks. He had been working there with his friend of fourteen years, Harold Sutherland, with whom he regularly commuted to and from work. Prior to the employment with Federal Sheet Metal, both men

had been off work and on unemployment compensation for six months, after working three and a half years for Chalk Point Power Plant in Maryland. Mr. Sutherland testified he first learned of Mr. Riley's hospital admission from Mrs. Riley who called him at 5:30 to 6:00 o'clock in the morning on November 20, advising him of Mr. Riley's hospitalization. Mr. Sutherland testified he went to the job site that day and again three to four days later and reported that Mr. Riley had been "hurt". The employer received no report of job-related injury to Riley from its foremen but was aware that Riley had been placed into the hospital for a "heart attack". The foreman who was told by Sutherland that Riley was in the hospital, was told three to four days after by Sutherland, that he had suffered a heart attack and was in intensive care.

The case was tried before an Administrative Law Judge who found as a fact that Mr. Riley had failed to prove an accidental injury under 33 U.S.C. § 902(2) and that he and Sutherland had given false testimony concerning the hoppening of the "accident". (see Appendix E.) This decision of the Administrative Law Judge was affirmed by the Benefits Review Board with a dissent. (See Appendix D.) The Respondent Riley petitioned for review pursuant to 33 U.S.C. § 921(c) to the United States Court of Appeals for the District of Columbia. On appeal the Director, Office of Workers' Compensation Programs intervened and adopted the dissent of Judge Miller of the Benefits Board. The Court of Appeals reversed the Benefits Review Board, asserting that under 33 U.S.C. § 920(a) there is a presumption that an "accidental injury" had occurred, and the Administrative Law Judge's decision was contrary to law because he failed to consider 33 U.S.C.

§ 920(a). (See Appendix C.) The Court held that because the Respondent Riley awakened in pain on November 20, 1975, that he suffered an "injury" and that by requiring the claimant to prove an accident did in fact occur, the Administrative Law Judge denied the claimant benefit of that presumption. The Court found that the Administrative Law Judge and Benefits Review Board had relied upon a "narrower statutory presumption" than required by the statute and, while vacating the decision of the Benefits Review Board and remanding "for full consideration of Petitioner's claim in light of this opinion" made no comment or finding concerning whether the evidence produced in the case was substantial evidence to rebut the presumption which the Court found should have been applied.

REASONS FOR GRANTING THE WRIT

I

The Decision of the District of Columbia Circuit Below is in Direct Conflict with the Rule of Law Followed in the Seventh, Fifth, Fourth and Second Circuits.

The lower Court in reversing the Administrative Law Judge and Benefits Review Board, found that 33 U.S.C. § 920(a) applied to determinations of whether the Respondent Riley had to prove an "accidental injury arising out of the course of employment", 33 U.S.C. § 902(2). (App. 10a.) Such finding is in direct conflict with decisions on the same issue in the Seventh, Fifth, Fourth and Second Circuits.

Initially it should be noted that the Respondent Riley's claim alleged that he suffered trauma striking his neck on duct work, or lifting heavy duct work which caused neck strain and thus disability from work. The Administrative Law Judge and the Benefits

Review Board both concluded in reviewing the evidence that no "accident" occurred, contrary to Respondent Riley's contentions that he injured himself at work on November 19, 1975. This Court has previously observed that the purpose of this legislation is to provide payment to employees who suffer loss as a result of personal injuries or death occurring *in the course of* their employment. *Baltimore and Philadelphia Steamboat Company* v. *Norton,* 284 U.S. 408-415. When the Respondent Riley was taken to the hospital at 2:30 a.m., he was not *in the course of employment.* His employment had terminated with the end of his workday in late afternoon of the day before. The Court of Appeals for the District of Columbia Circuit, however, found that Riley suffered "injury" when he awakened in pain in the early morning hours of November 20, 1975. This finding ignores the fact that Riley was "off work" because of arthritic pain in May, June and July, 1975, had been advised by his physician to retire from work, and had worked for this employer for three weeks with arthritic medication in his tool box. Once having found that Riley suffered "injury", the Court below found that "he was entitled to the benefit of the statutory presumption that his claim was compensable". (33 U.S.C. § 920(a).) (App. 10a.)

However, this finding of the lower Court ignores the question of whether or not the facts surrounding this "injury" were sufficient to bring the case within the statute; in other words, whether the disability was an "injury arising out of" Riley's employment. In *Ayers* v. *Hoage,* 63 F. 2d 364, 365, the D.C. Circuit defined an injury "arising out of" employment as follows:

> "An injury 'arises out of' the employment within the meaning of the Compensation Act when it oc-

curs in or incidental to the employment or to the conditions under which it is required to be performed. The mere fact that the injury is contemporaneous or coincident with the employment is not a sufficient basis for an award. *Indemnity Insurance Company of North America* v. *Hoage,* 61 App. D.C. 173, 58 F. 2d 1074, 60 Wash. Law Rep. 450; *Madore* v. *New Departure Manufacturing Co.,* 104 Conn. 709, 134 A. 259-261. In the Madore case the Court said: 'Before he can make a valid award, the trier must determine that there is a direct casual connection between the injury, whether it be the result of accident or disease and the employment. The question he must answer is: was the employment a proximate cause of the disablement, or was the injured condition merely contemporaneous or coincident with the employment; if it was the latter, there can be no award made'." See also *Groom* v. *Cardillo,* 119 F. 2d 697, 699 (D.C. Cir. 1941).

This case law placed the burden upon the injured party to prove his injury by showing that it arose out of employment activity or specific trauma on the job. This has remained the law and interpretation of the Longshoremen's and Harbor Workers' Act until the present time in the Seventh, Fifth, Fourth and Second Circuits. In the Seventh Circuit in the case of *Eschbach* v. *Contractors Pacific Naval Air Bases,* 181 F. 2d 860 (7th Cir. 1950), the employee contended that his tuberculosis condition resulted from or was caused by his employment. In discussing the § 20(a) presumption, the Seventh Circuit stated:

> The fact as to casual connection between the employment and the injury is not one which is to be so presumed. In the hearing before the Deputy Commissioner, the burden was on the Plaintiff to prove such fact." (181 F. 2d 864.)

In that case the claimant had contended that the burden was on the employer-insurance carrier to show that the plaintiff's condition did not arise from his employment, or was not aggravated by his employment. These contentions were rejected by the Court and the Deputy Commissioner's denial of the claim was reinstated by the Court.

In the Fifth Circuit case of *Young & Company* v. *Shea,* 397 F. 2d 185 (5th Cir. 1968), the Court stated as follows:

> "What the jury concluded was that there was no injury, or, as we said when the case was appealed, 'that the accident did not occur'." *Tugwell* v. *A. S. Klaveness & Co.,* 5th Cir. 1963, 320 F. 2d 866, 868 . . . Under 33 U.S.C. § 920(a), the claimant has the burden of proving all that is not presumed under § 920. See *Eschbach* v. *Contractors Pacific Naval Air Bases,* 7th Cir. 1950, 181 F. 2d 860. § 920 does not presume an injury so the claimant must prove its existence, *Sykes* v. *O'Hearne,* D. Md. 1960, 181 F. Supp. 368, 371.

In the Fourth Circuit case of *Furlong* v. *O'Hearne,* 144 F. Supp. 266 (D. Md. 1956), affirmed *O'Hearne* v. *Furlong,* 240 F. 2d 958 (4th Cir. 1957), the Court stated at page 271 as follows:

> "The presumption in § 920(a) does not relieve the claimant of the necessity of proving injury. *Eschbach* v. *Contractors Pacific Naval Air Bases,* 7th Cir. 181 F.2d 860, 864; *Larson,* Op. Cit. § 1033, § 80.33, see also *Del Vecchio* v. *Bowers,* 296 U.S. 280, 286, 56 S. Ct. 190, 80 L. Ed. 229."

In the Second Circuit in the case of *Gooding* v. *Willard,* 209 F.2d 813 (2d Cir. 1954), the Court in discus-

sing the claim for heart problems after a worker had fallen and struck his chest against a metal lunch box he was carrying, stated as follows in affirming the rejection of the claim by the Deputy Commissioner:

> "We might let the decision be determined on the above, but it should also be noted that the burden to show that the accident was a contributing cause of the death was on the appellee."

Despite the above cited opinions from other circuits, the District of Columbia Circuit has continued to provide their own interpretation of what is to be proven under the Act and how the statutory presumption should apply to cases construing the Act. Although the Administrative Law Judge found in his decision "that the claimant sustained no injury within the meaning of § 2(2) of the Act on November 19, 1975 as alleged", (App. 24a) the lower Court found that an "injury" had occurred to Riley and that the presumption under § 20 should have been applied by the Judge and the Benefits Review Board to the claimant's injury so that he receive the benefit of the rebuttable presumption that the injury arose out of and in the course of claimant's employment. More specifically, the holding is stated as follows:

> "We now hold expressly that where a claimant has been injured, the Act requires that, in the absence of substantial evidence to the contrary, a claimant be given the benefit of a rebuttable presumption that the injury arose out of and in the course of the claimant's employment. . . .
>
> * * * *
>
> "There is no question in this case that the claimant suffered an injury; therefore he was entitled to the benefit of the statutory presumption that his

> claim was compensable. By focusing on the "accident", which allegedly occurred on November 19, 1975, and by requiring the claimant to prove that the accident did in fact occur, the Administrative Law Judge denied the claimant the benefit of this presumption. The central finding, that no accident in fact occurred, is thus not responsive to the issue properly presented for resolution. The statutory presumption is not limited to the inference of a work-related incident from an injury, and neither is the scope of the employer's burden of coming forward with substantial evidence in rebuttal." (App. 10a.)

Thus, the lower Court in this case has effectively changed the law which has applied to the interpretation of cases under this Act since the *Eschbach* decision, by the present decision in *Riley*. The lower Court's decision has effectively wiped-out the long-standing requirement that the plaintiff prove facts to sustain his injury, and prove casual connection between the employment and the injury. Under this opinion, it is not necessary to prove an "injury arising out of and in the course of employment" had occurred to Mr. Riley. It should be noted that the statutory presumption which has been relied on, does not, by its terms, state that it is a presumption of injury, or a presumption of casual relationship between the injury and employment, but only "that the claim comes within the provisions of this Act". The history of this presumption interpreted by the Supreme Court begins with *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947). In that decision this Court stated that:

> "We are aided here, of course, by the provision of § 20 of the Longshoremen's Act, that in proceedings under that Act, jurisdiction is to be 'pre-

> sumed in the absence of substantial evidence to the contrary', a provision which applies with equal force to proceedings under the District of Columbia Act."

The Supreme Court next considered accidental injury arising out of employment under the Longshoremen's Act in 1951 in the case of *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 509, 95 L. Ed. 487. In that case there was no mention of the § 20(a) presumption at all, in a case dealing with whether or not the death claim arose out of and in the course of the decedent's employment. It was specifically mentioned in *O'Keefe* v. *Smith, Hinchman and Grylls Associates* at 380 U.S. 359, 85 S. Ct. 1012, 13 L. Ed. 2d 895 (1965). However, no discussion was undertaken by the Court as to how the presumption affected the facts at issue, except in the dissent. In this opinion the Supreme Court had reversed the Court of Appeals who had reversed a Deputy Commissioner's finding that the accident arose out of and in the course of the claimant's employment. There was no discussion as to how the presumption applied or whether it was to apply to "accident" or "injury" or "arising out of". In fact, it was the dissent which discussed this issue in some detail, as follows:

> "To permit the award of compensation to stand reads the "job-connected emphasis right out of the statute, an emphasis which is clearly there. Only injuries arising out of the employment are compensated. A disease or infection is covered if it arises "naturally out of such employment" .... A 'but for' relationship between the injury and the employment should not in itself be sufficient to bring about coverage."

It is the above dissent which has now come to fruition in the D.C. Circuit with the present case involving Ralph Riley. The holding of the lower Court extends the scope of this "workers' compensation" statute to make it general health insurance covering anything that goes wrong in the human frame. Under this decision any condition or ailment of ordinary life, is presumed to be related to a worker's employment, unless the employer can present substantial evidence to the contrary to rebut this presumption.[1] In order to avoid this unsupportable extention of the statute, it is necessary that the Supreme Court grant this writ to affirm that coverage under this Act must be limited to trauma or diseases resulting from working conditions peculiar to the calling, and that employers be not presumed to be held responsible for daily hazards involved in ordinary living. See *Grain Handling Co.* v. *Sweeney,* 102 F. 2d 464, 465 (2d Cir. 1939).

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[1] The holding of this Circuit in *Swinton* v. *J. Frank Kelly,* 554 F. 2d 1075 (D.C. Cir. 1976), *cert. den.* 429 U.S. 820, 97 S. Ct. 67, 50 L. Ed. 2d 81, is factually and legally distinguishable from the present case. In *Swinton* v. *J. Frank Kelly,* 554 F. 2d 1075, *cert. den.* 429 U.S. 820, 50 L. Ed. 2d 81 (1976) there was "no dispute as to the occurrence of the accident or the fact that any injuries associated with it arose out of and in the course of Swinton's employment. The focal issue was the extent of Swinton's injuries; specifically whether his back problem was causally related to the mishap on the truck". 554 F. 2d p. 1082.

II

The District of Columbia Circuit Has Decided an Important Federal Question Which Has Not Been, But Should Be, Settled by This Court.

Clearly, this case is of importance to the administration of the many thousands of claims under the Longshoremen's and Harbor Workers' Act (33 U.S.C. 901 *et seq.*) and its Extensions which include the Defense Base Act (42 U.S.C. § 1651-1654 (1976)), and Non-Appropriated Fund Instrumentalities Act (5 U.S.C. § 8171-8173 (1976)), the Outer Continental Shelf Lands Act (43 U.S.C. § 1331-1343 (1976 & Supp. 1 1977)), and to all non-governmental employees under the District of Columbia Workers' Compensation Act (36 D.C. Code 501, *et seq.*). If this interpretation of the definition of "injury" under this Act and the application of the § 20(a) presumption to it is allowed to stand, the District of Columbia Circuit Court opinion will affect every claim coming under the aforementioned Federal Acts. In order for there to be a claim under these Acts, there must be "injury arising out of and in the course of employment". The decision of the lower Court affects that definition and burden of proof, and the Court's interpretation will bring workers' compensation into every non-occupational injury, disease or condition suffered by an employee subject to the jurisdiction of the aforementioned Federal Acts. If allowed to stand, the District of Columbia Circuit's opinion will undoubtedly burden the administrative bodies and the courts with much additional litigation over the casual relationship to employment of such heretofor common events of ordinary life such as colds, virus, heart attack, cancer, pneumonia, and death from

related conditions of old age. Under the lower Court's decision there is no longer any "nexus" required between employment and injury in order for an employee to seek workers' compensation benefits under this statute. An employee may be in perfect health at quitting time from his usual employment, and the next day if "something goes wrong within the human frame", this decision holds that the employee has suffered "injury" and, accordingly, can claim workers' compensation benefits for any ailment which he has. The employee is not required to put on *any* proof whatsoever or show that he had suffered an "accidental injury or death arising out of and in the course of his employment". (33 U.S.C. 902(2).) The lower Court's decision has suggested a new method for resolving workers' compensation cases under the aforementioned Federal Acts: the employee files his claim, then the employer puts on evidence to try to rebut the § 20 presumption of "accidental injury" or casualty, and then if there is "substantial evidence to the contrary", *Del Vecchio* v. *Bowers,* 296 U.S. 280, 56 S. Ct. 193, 80 L. Ed. 229 (1935), the employee will present his evidence to rebut the employer's evidence. However, the employee and employer know that in the compensation proceeding any doubt is to be resolved in favor of the employee, and the Act as "remedial legislation" is to be liberally construed in his favor. *Wheatley* v. *Adler,* 407 F. 2d 307, 313 (D.C. Cir. 1968).

The important federal question raised herein should be resolved by the Court.

III

To Insure the Proper Scope of Judicial Review in Accordance With Established Supreme Court Precedent.

This Court has held on numerous occasions, under the Longshoremen's and Harbor Workers' Compensation Act, that where the evidence before the Deputy Commissioner (Administrative Law Judge) permits the drawing of diverse inferences, his determinations of fact are to be accepted unless they are unsupported by substantial evidence in the record considered as a whole. *O'Keefe* v. *Smith Associates, supra; O'Leary* v. *Brown-Pacific-Maxon, Inc., supra.* Moreover, that the facts permit diverse inferences is immaterial; if supported by the evidence, the inferences drawn by the Administrative Law Judge are conclusive. *O'Keefe* v. *Smith Associates, Inc., supra; Presley* v. *Tinsley Maintenance Service,* 529 F. 2d 433, 436 (5th Cir. 1976). When a decision of the Benefits Review Board is before the Court of Appeals, review is limited to areas of law, including the question of whether the Board adhered to the substantial evidence standard in its review of factual findings. *Presley* v. *Tinsley Maintenance Service, supra; Potenza* v. *United Terminals, Inc.,* 524 F. 2d 1136, 1137 (2d Cir. 1975). And even when the issue involves the "application of a broad statutory term or phrase to a specific set of facts," the Board's decision will be affirmed so long as it has a "reasonable legal basis". *Cardillo* v. *Liberty Mutual Insurance Co., supra.*

In *Riley,* the Administrative Law Judge stated that he did construe the evidence in a light most favorable to the claimant, and with all doubts resolved in favor of the injured employee. *Young and Co.* v. *Shea,* 397

F. 2d 185, 188 (5th Cir. 1968) *cert. den.* 395 U.S. 920, 89 S. Ct. 1771, 23 L. Ed. 2d 237 (1969). But the Administrative Law Judge also found on the evidence "that the claimant sustained no injury within the meaning of § 2(2) of the Act on November 19, 1975, as alleged, and that claimant and [his friend] gave false testimony as to the happening of an accident". (App. 24a.) In reviewing these findings, the lower Court cited the standard that "an administrative order must be set aside if it rests on factual premises not based on substantial record evidence, or if the Agency's underlying standards are not in accord with law". *Wheatley* v. *Adler*, 407 F. 2d at 310. The Court found as follows:

> "We are stymied in the application of this standard from the start. Because the Administrative Law Judge and the Benefits Review Board relied upon a statutory presumption narrower than that elaborated here, the Agency did not make all of the findings necessary for a proper disposition of Petitioner's claim. We cannot anticipate what these findings will be. See *Vendemia* v. *Cristaldi*, 221 F. 2d 103, 106 (D.C. Cir. 1955)." (App. 10a-11a.)

Even though the lower Court found that the decision of the Benefits Review Board was erroneous, it is asserted that this Court should do as it did in *Del Vecchio* v. *Bowers, supra.*, and reverse the Circuit Court of Appeals and reinstate the decision of the Benefits Review Board. It appears from the lower Court's decision that they now desire a determination whether the injuries suffered by the claimant might have been "employment-bred". It should not be the function of this Court or the lower Court to engage upon review in speculation as to what facts might further be presented to enable the Respondent Riley to recover com-

pensation. The reviewing Court may not reweigh the evidence and questions of credibility are for the Administrative Law Judge. *South Chicago Coal & Dock Co.* v. *Basset,* 104 F. 2d 522 (7th Cir. 1939) aff'd. 309 U.S. 251 (1940); *John W. McGrath* v. *Hughes,* 289 F. 2d. 403 (2d Cir. 1961); *Calbeck* v. *Strachan Shipping Co.,* 306 F. 2d 693 (5th Cir. 1962) *cert. den.* 372 U.S. 954 (1963); *Cordero* v. *Triple A Machine Shop,* 580 F. 2d 1331 (9th Cir. 1978). In fact, the Judge found:

> "That claimant and Sutherland gave false testimony as to the happening of an accident.
>
> "The record, in my judgment, is free of doubt and permits of no other findings as to the credibility of claimant and Sutherland." (App. 24a.)

Here in this record, the Petitioners have provided sufficient proof to rebut the presumption, if it applies to the case. *Travelers Insurance Co.* v. *Belair,* 412 F. 2d 297, 301 n.6 (1st Cir. 1969); *John W. McGrath Corporation* v. *Hughes, supra.* This Court has noted that the presumption serves only to control the result where there is a total lack of competent evidence. *Del Vecchio* v. *Bowers, supra.* It is contended that the presumption is without effect where, as here, the totality of evidence places the Respondent's claim outside of the recognized coverage of the Longshoremen's Act.

The lower Court citing *Vozzolo, Inc.* v. *Britton,* 377 F. 2d at 147-148, stated: "employers accept with their employees the frailties that predispose them to bodily hurt". (App. 7a.) After reviewing cases under the D.C. Act, the lower Court in *Riley* opined that its cited cases "make clear the pervasive scope of the statutory presumption of compensability". It is submitted, however, that the lower Court reweighed the evidence presented

before the Administrative Law Judge and substituted its own judgment for the decision which it felt that he should have arrived at. The Court stated that "Even if the asserted work-related incident had never occurred, the injuries suffered by the claimant might nevertheless have been employment-bred. As a consequence, for purposes of this proceeding, Petitioner was entitled to the presumption that they were". This result is completely contrary to the Supreme Court's standard of review as referenced above. To borrow from Judge Tamm's dissent in *Wheatley* v. *Adler,* 407 W. 2d 307, 318 (D.C. Cir. 1968):

> "My deep concern about the majority opinion is that in an effort to achieve a humanitarian result my learned and well intentioned brethren are ignoring all established precedents and virtually placing this type of case on a basis of compassion. I readily recognize the liberal philosophy of the courts in construing workmen's compensation laws but I cannot subscribe to a doctrine of superior credibility of claimant's witnesses or of inherent suspicion toward those wtinesses, lay and professional, who testify adversely to the claim. . . . As too frequently happens in this court, the majority completely ignores the superior opportunity which the trier of facts, in this case the Deputy Commissioner [now Administrative Law Judge], had to observe the witnesses in person, evaluate their manner of testifying and compare their relative characteristics before arriving at a determination of their credibility.
>
> * * * *
>
> "We cannot substitute our judgment for the Deputy's [Administrative Law Judge's] judgment, nor can we weigh the evidence. *Groom* v. *Cardillo,* 73 App. D.C. 358, 359, 119 F. 2d 697, 698 (1941). The series of cases in this field that will result

> from today's opinion, will produce a brouhaha lacking foundation and logic, organization in reason and justification on any legal basis. The resulting paraselenae will negate the realism of proceeding before the Deputy Commissioner [Administrative Law Judge] and dissolve the significance of any bona fide defense to a workmen's compensation claim."

The question now comes to this Court for its answer.

CONCLUSION

For all of the reasons set forth above herein, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

RICHARD W. GALIHER, JR.
1215 Nineteenth Street, N.W.
Washington, D.C. 20036
202-331-8330

Attorney for Petitioners

Of Counsel:

GALIHER, CLARKE, MARTELL
& DONNELLY
1215 Nineteenth Street, N.W.
Washington, D.C. 20036

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-1417

RALPH RILEY,
Claimant/Petitioner

v.

U.S. INDUSTRIES/FEDERAL SHEET METAL,
Employer/Respondent

and

INSURANCE COMPANY OF NORTH AMERICA,
Carrier/Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Intervenor

Filed July 3, 1980

BEFORE: Wilkey, Wald, and Edwards; Circuit Judges

ORDER

Upon consideration of respondents' petition for rehearing, it is

ORDERED, by the Court, that respondents' aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 79-1417

RALPH RILEY,
Claimant/Petitioner

v.

U.S. INDUSTRIES/FEDERAL SHEET METAL,
Employer/Respondent

and

INSURANCE COMPANY OF NORTH AMERICA,
Carrier/Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Intervenor

Filed July 3, 1980

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, and Edwards, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by respondents' having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that respondents' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
Clerk

Circuit Judges Tamm, MacKinnon, and Robb would grant respondents' suggestion for rehearing *en banc*.

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1417

RALPH RILEY, *Petitioner*

v.

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC.

and

INSURANCE COMPANY OF NORTH AMERICA, *Respondents*

Petition for Review of a Decision
and Order of the Benefits Review Board,
United States Department of Labor

Argued April 25, 1980

Decided May 22, 1980

Judgment entered this date

James F. Green with whom *Joseph H. Koonz, Jr.* and *James A. Mannino* were on the brief for petitioner.

Richard W. Galiher, Jr. for respondents.

Gilbert T. Renaut was on the brief for the Director, Office of Workers' Compensation Programs, United States Department of Labor, Intervenor, urging reversal.

Bill of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before WILKEY, WALD and EDWARDS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: This appeal from a decision of the Benefits Review Board raises questions concerning the scope of the statutory presumption of compensability contained in the Longshoremen's and Harbor Workers' Compensation Act (the "Act").[1] At the initial hearing in this case before the administrative law judge ("ALJ"), petitioner's claim for compensation was denied. The decision of the ALJ was subsequently affirmed by the Benefits Review Board, with one member dissenting. Since we find that the decisions rendered at the administrative level misapplied the statutory presumption in considering petitioner's claim, we reverse and remand for reconsideration in light of the standards set forth in this opinion.

I.

The petitioner, who is fifty-four years old, has been a sheet metal worker for approximately thirty-two years. Beginning in 1970, the petitioner has suffered recurring neck ailments which have been diagnosed as arthritic in origin. The incident giving rise to the instant claim allegedly occurred on November 19, 1975, when the petitioner was installing duct work into a ceiling at Walter Reed Hospital. At the hearing before the ALJ, petitioner repre-

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[1] Act of March 4, 1927, ch. 509, 44 Stat. 1124, as amended, 33 U.S.C. § 901 *et seq.* (1967), made applicable to the District of Columbia, with exceptions not relevant here, by the Act of May 17, 1928, ch. 612 §§ 1, 2, 45 Stat. 600, as amended, D.C. Code §§ 36-501, 36-502 (1973). *See Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028 (1947). The statutory presumption of compensability is found in Section 20 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 920 (1976).

sented that he struck his neck and shoulders on overhead duct work late in the afternoon as he was hoisting himself from the lower to the upper level of a scaffold. Petitioner's story was corroborated by the testimony of a co-worker who was on the job with petitioner on the day in question and with whom petitioner had maintained a friendship for fourteen years. There were no other witnesses to the alleged incident.

In the early morning after the occasion of the alleged accident, the petitioner awoke with severe pains in his neck, shoulders and arms, and was taken to the hospital. A heart attack was originally suspected, but doctors subsequently concluded that the petitioner's discomfort was due to an exacerbation of his arthritic condition. The record reveals some dispute as to whether the petitioner told his attending physicians about the accident which allegedly occurred while he was at work on November 19, 1975. There is also a dispute as to whether petitioner's friend and co-worker, who was the sole witness to the alleged accident, reported the incident to his superiors the next day.

The claimant filed a claim for permanent total disability under the Act on December 29, 1975. Following a two-day hearing and the submission of post-hearing depositions, the ALJ denied petitioner's claim in a decision dated June 22, 1978. The ALJ found "that Claimant sustained no injury within the meaning of Sec. 2(2) of the Act on November 19, 1975, as alleged, and that Claimant and [his friend] gave false testimony as to the happening of an accident." App. 93. In reaching these conclusions, the ALJ observed that:

> In evaluating evidence on the issue of "injury", it is clear that while the Section 20 presemption [sic] is inapplicable to the happening of an accident and while the burden rests with the Claimant to prove an accident, *Murphy v. SCA/Shayne Bros.*, 7 BRBS 309 (1977), the evidence must nevertheless be construed

> in a light most favorable to Claimant and all doubts must be resolved in Claimant's favor.

App. 93.

In upholding the decision of the ALJ, a majority of the Benefits Review Board concluded that:

> * * * the administrative law judge's summary and analysis of the evidence are both supported by the record and consistent with the applicable law. There can be no question that the inferences drawn by the administrative law judge, *which led him to conclude that no accident occurred,* are reasonable and that the administrative law judge's conclusion on this point must be affirmed. (emphasis added)

App. 101.

The dissenting member of the Benefits Review Board urged that the decision of the ALJ should have been reversed because "the real issue in this case is not whether claimant sustained an accident at work but whether claimant's injury is causally related to his employment." App. 103. Both petitioner and intervenor (the Director of the Office of Worker's Compensation Programs, United States Department of Labor), have embraced the opinion of the dissenting member of the Benefits Review Board. Petitioner, in particular, argues that both the ALJ and the majority opinion of the Benefits Review Board, in focusing on the alleged "accident" of November 19, 1975, improperly denied claimant the benefit of a statutory presumption with respect to the issue of causation. Petitioner maintains, in other words, that he was denied the presumption that his *injury* "arose out of and in the course of" his employment, as the statute requires. We agree.

II.

The statutory presumption of compensability, which appears at section 20(a) of the Act, 33 U.S.C. § 920(a), reads as follows:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed in the absence of substantial evidence to the contrary—
>
> (a) that the claim comes within the provisions of this Act.

Two other statutory provisions define and limit the scope of liability under the Act. Pursuant to 33 U.S.C. § 903, compensation shall be payable in respect of disability resulting from an "injury" covered by the Act.[2] "Injury" is defined to include, in part, "accidental injury or death arising out of and in the course of employment." 33 U.S.C. § 902(2). Judicial scrutiny of the Act has concerned itself primarily with the nature of a compensable injury and with the requirement that such an injury be "employment-bred" —that is, arising out of and in the course of employment. See *J. V. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 149 (D.C. Cir. 1967).

III.

On the record in this case, it can hardly be disputed that petitioner suffered an "injury" when he awakened in pain on November 20, 1975. Prior decisions in this Circuit make it plain that the pre-existence of petitioner's arthritic neck condition could not, without more, be deemed to be a determinative factor in this case. As was noted in *J. V. Vozzolo, Inc. v. Britton*, 377 F.2d at 147-48, "employers accept with their employees the frailties that predispose them to bodily hurt."

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[2] Other limitations on compensability contained in section 903 are not relevant here.

It is likewise clear that an "injury" need not be an external one in order to be covered by the Act. It is enough if "something unexpectedly goes wrong with the human frame." *See Wheatley v. Alder*, 407 F.2d 307, 313 (D.C. Cir. 1968) (*en banc*). The hospitalization of petitioner, during the early morning hours of November 20, 1975, is not questioned. Furthermore, both the preliminary diagnosis of a heart attack and the subsequent finding that the pain suffered by petitioner was due to an exacerbation of his arthritic neck condition indicate that the claimant's condition had taken a "sudden turn for the worse." *Id.* at 312. In the light of this evidence, which is undisputed, there can be no question but that petitioner suffered an "injury" as that term has been heretofore construed under the Act.

IV.

Since the record here reveals that petitioner did, indeed, suffer an "injury," we must now turn our attention to the statutory presumption and the range of situations to which this Court has applied it. In cases where there has been no question with respect to the existence of an injury "in the course of" employment the Act has been consistently interpreted to require that the injury be presumed to have arisen "out of" employment as well. *Mitchell v. Woodworth*, 449 F.2d 1097 (D.C. Cir. 1971); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*). "[T]he occurrence of an injury in the course of employment strengthens the presumption that it arises out of the employment, . . ." *Vendemia v. Cristaldi*, 221 F.2d 103, 105 (D.C. Cir. 1955), *quoted with approval* in *Wheatley v. Adler*, 407 F.2d at 312.

This Court has also consistently held that an injury need not have occurred during working hours in order to be compensable. In *Swinton v. Kelly*, 554 F.2d 1075 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976), the injury for

which compensation was sought was a back ailment that became manifest almost a year after the claimant's work-related fall from a truck. The Court noted that "[t]he statutory presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of the claim." *Id.* at 1082 (footnote omitted). An even more striking example is found in *J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967), where a heart attack was held to be compensable although it was claimed to have stemmed from an employment-related incident occurring five years before. The Court applied the statutory presumption as follows:

> Moreover, the Act presumes that, in the absence of substantial evidence to the contrary, a compensation claim falls within rather than outside its provisions. The record makes no substantial evidentiary disclosure that would support the proposition that the [second] infarction was incited by anything outside the employment.

Id. at 150 (footnote omitted).

This Court has also held that an injury need not be traceable to any particular work-related incident to be compensable. In *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966), we held that statutory presumption applicable to a mental breakdown apparently suffered as the cumulative result of the claimant's twenty years of service as a parking lot attendant. Similarly, it has been held that there is no requirement that the injury arise from any unusual work-related stress for the presumption to apply. *Mitchell v. Woodworth*, 449 F.2d 1097 (D.C. Cir. 1971); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968) (*en banc*).

The foregoing cases make clear the pervasive scope of the statutory presumption of compensability. Indeed, no decision of this Court has ever failed to apply the presump-

tion to any facet of any claim before it. We now hold expressly that where a claimant has been injured, the Act requires that, in the absence of substantial evidence to the contrary, a claimant be given the benefit of a rebuttable presumption that the injury arose out of and in the course of the claimant's employment.

V.

There is no question in this case that the claimant suffered an injury; therefore, he was entitled to the benefit of the statutory presumption that his claim was compensable. By focusing on the "accident" which allegedly occurred on November 19, 1975, and by requiring the claimant to prove that the accident did in fact occur, the ALJ denied the claimant the benefit of this presumption. The central finding, that no accident in fact occurred, is thus not responsive to the issue properly presented for resolution. The statutory presumption is not limited to the inference of a work-related incident from an injury, and neither is the scope of the employer's burden of coming forward with substantial evidence in rebuttal. Even if the asserted work-related incident had never occurred, the injuries suffered by the claimant might nevertheless have been "employment-bred." As a consequence, for purposes of this proceeding, petitioner was entitled to the presumption that they were.[8]

In a case of this sort, "[a]n administrative order must be set aside if it rests on factual premises not based on substantial record evidence or if the agency's underlying standards are not in accord with law." *Wheatley v. Adler*, 407 F.2d at 310. We are stymied in the application of this

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[8] During the oral arguments in this case, a question arose as to whether the statutory presumption of compensability applies not only to the fact of causality, but also to the fact of injury. Since there is no issue concerning the occurrence of an "injury" in this matter, we find it unnecessary to address this question.

standard from the start. Because the ALJ and the Benefits Review Board relied upon a statutory presumption narrower than that elaborated here, the agency did not make all of the findings necessary for a proper disposition of petitioner's claim. We cannot anticipate what these findings will be. *See Vendemia v. Cristaldi*, 221 F.2d 103, 106 (D.C. Cir. 1955).

We hereby vacate the decision of the Benefits Review Board and remand the case for a full reconsideration of petitioner's claim in light of this opinion.

So ordered.

APPENDIX D

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210

BRB No. 78-451

RALPH RILEY
Claimant-Petitioner

v.

U.S. INDUSTRIES/FEDERAL SHEET METAL

and

INSURANCE COMPANY OF NORTH AMERICA
Employer/Carrier-Respondents

Filed as Part of the Record February 27, 1979

DECISION

Appeal from the Decision and Order of William A. Gershuny, Administrative Law Judge, United States Department of Labor.

James F. Green (Ashcraft, Gerel & Koonz), Washington, D.C., for the claimant.

Richard W. Galiher, Jr. (Galiher, Clarke, Martell & Donnelly), Washington, D.C., for the employer/carrier.

Before: SMITH, Chairman, MILLER and KALARIS, Members.

KALARIS, Member:

This is an appeal by the claimant from the Decision and Order (78-DCWC-82) of Administrative Law Judge William A. Gershuny pursuant to the provisions of the Long-

shoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501 *et seq.* (hereinafter, the Act).

Claimant has been a sheet metal worker for 32 years. In 1970 he was diagnosed as suffering from cervical arthritis. Claimant testified that on November 19, 1975, he was working on a scaffold with co-worker Howard Sutherland hoisting ductwork onto trapeze hangers and positioning it for proper alignment. Toward the end of his work shift, claimant stated that he was moving to a second, higher level of scaffolding when he struck the back of his neck on the lower duct line, knocking his hard hat off and causing him to fall back onto his knees. After the incident, claimant took some medication he had with him which he occasionally used to relieve pain from his cervical arthritis. However, claimant stated that the pain from his injury was much worse and involved the back of his head, his arms, and his chest. Mr. Sutherland drove claimant home and claimant retired early. At about 2:30 the following morning, claimant awoke with severe pains in his arms, neck, and chest. His wife drove him to the hospital where his condition was preliminarily diagnosed as a myocardial infarction. However, the final diagnosis was cervical osteoarthritis and hiatal hernia.

Claimant sought compensation under the Act for permanent total disability from November 20, 1975 and continuing. In the Decision and Order, the administrative law judge framed the issues to be determined as:

> (1) Whether Claimant sustained an injury, within the meaning of Sec. 2(2) of the Act, on November 19, 1975 as alleged;
>
> (2) Whether timely notice under Sec. 12 was given to Respondent; and
>
> (3) Claimant's average weekly wage.

The administrative law judge concluded that there occurred no injury within the meaning of Section 2(2) of the Act, 33 U.S.C. § 902(2), and accordingly did not consider the remaining issues.

Claimant appeals contending that the administrative law judge misconstrued the meaning of the term "injury", and failed to apply the presumption in Section 20 of the Act, 33 U.S.C. § 920, properly. Claimant also contends that the administrative law judge erroneously resolved factual doubts against claimant, and that the Decision is not supported by substantial evidence in the record considered as a whole.

The Board's standard of review requires that we affirm a decision if the facts found by the administrative law judge are supported by the record and the decision is in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith Associates*, 380 U.S. 359 (1965). Moreover, the inferences drawn by the administrative law judge must be accepted unless they are irrational or inconsistent with law. *See Cardillo v. Liberty Mutual Ins. Co.*, 33 U.S. 469 (1942). The Board may not reweigh the evidence and questions of credibility are for the administrative law judge. *South Chicago Coal and Dock Co. v. Bassett*, 104 F.2d 522 (7th Cir. 1939), *aff'd*, 309 U.S. 251 (1940); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

The law applied by the administrative law judge and the conclusion he reached was stated as follows:

> In evaluating evidence on the issue of "injury", it is clear that while the Section 20 presumption is inapplicable to the issue of the happening of an accident and while the burden rests with Claimant to prove an accident, *Murphy* v. *SCA/Shayne Bros.*, 7 BRBS 309 (1977), the evidence must nevertheless be construed in

> a light most favorable to Claimant and all doubts must be resolved in Claimant's favor.
>
> Applying these standards, I find that Claimant sustained no injury within the meaning of Sec. 2(2) of the Act on November 19, 1975, as alleged, and that Claimant and Sutherland gave false testimony as to the happening of an accident.

D & O at 5.

The administrative law judge sets forth his reasons for reaching this conclusion in detail in the Decision below. Briefly stated, the administrative law judge found the following facts significant: Claimant and Mr. Sutherland had been friends for 14 years and their testimony at the hearing regarding the way in which claimant's accident occurred was identical. However, prior to the time of the hearing, the accident was described as the result of lifting heavy duct work and not from a blow to the head. Claimant's son and wife, who could have corroborated his contemporaneous complaint of an accident, were not called to testify.[1] Claimant made no complaint of neck and shoulder pain upon admission to the hospital and did not mention an accident at work even though he gave a history which revealed two prior accidents. The first time an alleged accident at work was reported to employer was November 26, 1975. In addition, the administrative law judge found that the alleged accident was not reported to claimant's treating physicians until December 19, 1975.

From these facts, the administrative law judge inferred that the story of an accident was not constructed until claimant's release from the hospital on November 25, 1975, and that claimant's differing accounts of the accident, "[R]enders unbelievable his testimony as to the happen-

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[1] *See Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835, 841, BRB Nos. 78-304 & 78-304/A (Sept. 29, 1978).

ing of any accident." Accordingly, the administrative law judge denied the claim.

After careful review, we conclude that the administrative law judge's summary and analysis of the evidence are both supported by the record and consistent with the applicable law. There can be no question that the inferences drawn by the administrative law judge, which led him to conclude that no accident occurred, are reasonable and that the administrative law judge's conclusion on this point must be affirmed.

Claimant's argument that the administrative law judge did not resolve doubts in claimant's favor is without merit. This rule does not require that the administrative law judge always find for claimant when there is a dispute or conflict in the testimony. *Lee v. Hechinger Co.*, 3 BRBS 288, BRB No. 75-195 (Feb. 27, 1976); *Stanley v. Maryland Shipbuilding and Dry Dock Co.*, 5 BRBS 101, BRB No. 76-205 (Oct. 5, 1976). It merely means that, if doubt about the proper resolution of conflicts remains in the administrative law judge's mind, these doubts should be resolved in claimant's favor. It is clear that the administrative law judge's conclusions in the present case were arrived at without doubts about what the administrative law judge felt to be the proper resolution of conflicts.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

/s/ Ismene M. Kalaris
Ismene M. Kalaris, Member

I Concur:

/s/ Samuel J. Smith
Samuel J. Smith, Chairman

Dated this 27th day of February, 1979.

MILLER, Member, dissenting:

I respectfully dissent from the majority's opinion in this case. The majority apparently affirms the administrative law judge on the theory that claimant has failed to prove that he sustained an accident at work. It is my opinion that both the administrative law judge and the majority have confused the meaning of the terms "accident" and "injury."

The Act does not require that claimant prove an accident in order to establish a claim. To the contrary, compensation is payable under the Act if claimant is disabled because of *injury* which is causally related to his employment, 33 U.S.C. §§ 902(10), 902(2).

If something goes wrong within the human frame, there has been an injury. *Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968); *Southern Stevedoring Co. v. Henderson,* 175 F.2d 863 (5th Cir. 1949). In *Furlong v. O'Hearne,* 144 F. Supp. 266, 270, (D. Md.-1956), the court quoted the following as one of the best definitions of "injury":

> In common speech, the word 'injury' as applied to a personal injury to a human being, includes *whatever lesion or change in any part of the system produces harm or pain* or a lessened facility of the natural use of any bodily activity or capability." (Emphasis added).

Moreover, it is well settled that an aggravation of a preexisting condition is an injury within the meaning of the Act. *Wheatley v. Adler, supra.* Clearly, the facts in the instant case establish that claimant suffered an injury on November 20, 1975, when he awoke with pain in his chest and arms which was later diagnosed as the result of cervical osteoarthritis.

Therefore, the real issue in this case is not whether claimant sustained an accident at work but whether claim-

ant's injury is causally related to his employment. This issue must be determined in light of the presumption in Section 20(a) of the Act, 33 U.S.C. § 920(a), which "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. Kelly*, 554 F.2d 1075 (D.C. Cir. 1976). The presumption places the burden on employer to prove by substantial evidence that claimant's injury did not arise out of or in the course of employment. *Marra Bros. v. Cardillo*, 154 F.2d 357 (3d. Cir. 1946). *Kwasizur v. Cardillo*, 77 F. Supp. 107 (E.D.Pa. 1948).

Because the administrative law judge incorrectly focused his attention on whether claimant sustained an accident, the decision contains no findings or analysis of whether employer has presented evidence sufficient to rebut the Section 20 presumption. Instead, the administrative law judge found that claimant lied about the accident at work. However, the mere fact that claimant may have lied does not disentitle him to compensation for any disability he may have as a result of his employment. *Miller v. O'Hearne*, 181 F. Supp. 105 (D. Md. 1960); *Ennis v. O'Hearne*, 223 F.2d 755 (4th Cir. 1955). Moreover, contrary to the majority's conclusion in this case, the Board has held that a claimant's lack of candor is not substantial evidence to support a denial of a claim. *Alley v. Garfinkel Co.*, 1 BRBS 66, BRB No. 74-111 (Aug. 6, 1974); *See also Roberson v. Bethlehem Steel Corp.*, 8 BRBS 775, BRB No. 77-109 (Sept. 11, 1978) (Miller, Member, dissenting).

I therefore conclude this case should be reversed and remanded for a determination of whether employer has rebutted the Section 20 presumption.

/s/ JULIUS MILLER
Julius Miller, Member

APPENDIX E

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 78-DCWC-82
OWCP No. 100376

In the Matter of

RALPH RILEY
Claimant

against

U.S. INDUSTRIES/FEDERAL SHEET METAL
Employer

and

INSURANCE COMPANY OF NORTH AMERICA
Carrier

James F. Green, Esquire
2101 "L" Street, N.W.
Washington, D.C. 20037
For the Claimant

Richard W. Galiher, Jr., Esquire
1215 19th Street, N.W.
Washington, D.C. 20036
For the Respondents

Before: WILLIAM A. GERSHUNY
Administrative Law Judge

DECISION AND ORDER

Claimant, a sheetmetal worker, seeks permanent total disability benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, as ex-

tended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code 501 *et seq.*, based on a disabling neck injury allegedly sustained on November 19, 1975, at a construction site in the District of Columbia.

A hearing was conducted on March 20 and 24, 1978 and additional medical evidence was submitted through post-hearing depositions of Drs. Sanchez and Wisotsky, both of which are admitted in evidence.

The principal issues presented are—

(1) Whether Claimant sustained an injury, within the meaning of Sec. 2(2) of the Act, on November 19, 1975 as alleged;

(2) Whether timely notice under Sec. 12 was given to Respondent; and

(3) Claimant's average weekly wage.

Because I conclude that no injury, in fact, occurred, the remaining issues are not considered.

In his Pre-Hearing Statement of December 5, 1977, and opening statement at the hearing, Claimant stated his claim to be based on a November 19, 1975 accident in which he felt a sharp neck pain while lifting duct work weighing approximately 500 lbs.

The alleged accident was testified to in different terms, however, by Claimant and Howard Sutherland, a co-worker, close personal friend for 14 years and the sole witness. Their testimony as to the happening of the accident was identical: Claimant, while raising himself from one level of a scaffold to a higher one struck the back of his neck and shoulders on duct work which previously had been installed on hangers suspended from the ceiling. At the time, Claimant was about to make final duct alignment adjustments. Because the alleged incident occurred near the end of the shift, most of the other workers already

were gone and Claimant and Sutherland left without reporting it to any management personnel at the job-site.

Claimant testified that, upon arriving home, he informed his wife that he had "hit my head on the duct". Presumably, his son was also informed, since Claimant testified that the son was required to pick up his father's truck which was left at Sutherland's home because Claimant was unable to drive. Despite the fact that each could have corroborated Claimant's contemporaneous complaint of an accident, neither was called to testify.

In the early hours of the following morning, Claimant awoke with severe chest pains and was admitted to the hospital with a preleminary diagnosis of a myocardial infarction. Hospital records on admission at 6:25 a.m. indicate complaints of tightness in arms and chest, blurry vision and inability to walk; a history of a similar episode one year earlier and a cholestoral problem; and a finding on physical examination of "neck-supple, nontender."

At 7:30 a.m. a more comprehensive history was taken and again no complaints of neck or shoulder pain were made and, despite a history given of other prior injuries and cervical arthritis, no history of an accident on the previous day was given to the attending physician.

Although the failure of Claimant or his wife to give a history of the accident which allegedly occurred less than 17 hours earlier is perhaps understandable during the excitement of an admission for a suspected heart attack, the absence of complaints of neck and shoulder pain is significant, in view of Claimant's testimony as to the severity of the pain produced by the accident.

Hospital records indicate that a heart attack later was ruled out, and a final diagnosis made of cervical osteoarthritis and hiatal hernia (which produces symptoms similar to those of a myocardial infarction).

Particularly significant is the history given by Claimant to Dr. Sanchez, a consulting orthopedist, on November 23, 1975, the fourth day of hospitalization. It includes the origins and treatment of the cervical arthritic condition, a description of Claimant's work and the circumstances of a work-connected injury in 1969 and a service-connected injury many years earlier. Despite Claimant's testimony that he told Dr. Sanchez at that time about the November 19, 1975 accident, the medical record of November 23, 1975 is silent. Furthermore, Dr. Sanchez testified on deposition that he saw Claimant in the hospital on more than one occasion, but no mention was made of an incident on November 19, 1975.

On December 19, 1975, during an office visit, Claimant gave a history to Dr. Sanchez of experiencing "pain at the base of the neck" in November 1975, while "moving the duct work into position," adding that, with the excitement of the hospital admission, "he forgot to mention to the attending physicians [including Dr. Sanchez] this incident that happened at work."

Dr. Wisotsky, who saw Claimant on December 5, 1975, after his release from the hospital, and again on December 12, 1975 and January 2, 1976, has no record of a history of an injury at work, although he recalls that, at some time between 1975 and 1977, Claimant told him he was struck on the back of the neck. Nor was a history of an injury at work given by Claimant to Dr. Scalettar, who examined Claimant on December 9, 1975, or to Dr. Maguigad, who examined Claimant on December 15, 1975.

The story of the November 19, 1975 "accident" first surfaced, however, on November 26, 1975, the day on which I find Sutherland first returned to work following Claimant's hospitalization. He testified that he told a number of coworkers, including foreman Fury, that Claimant "had struck his neck and shoulder on the duct." Fury, a fellow member of

Claimant's local union and no longer employed by Respondent, testified only that Sutherland stated Claimant was "hurt on the job".

Not only is it significant that the happening of the "accident" first was reported to the Employer seven days after it allegedly occurred and to Claimant's treating physicians not earlier than 30 days after, it is equally important in an evaluation of the evidence to trace Claimant's differing versions of the accident.

As stated above, the testimony of Claimant and Sutherland at the hearing described an accident in which Claimant struck his neck and shoulder on an already positioned duct, while raising himself from one level of the scaffold to another. Yet, remarkably, this was the first time that the accident was described in terms of a bump or blow to the body while climbing a scaffold. Prior to the time of hearing the accident was described as involving the lifting of heavy ductwork, as is reflected by the following portions of the record:

December 19, 1975 examination by Dr. Sanchez (report dated January 26, 1976): "moving duct work into position, when he felt pain at the base of the neck."

December 29, 1975 compensation claim signed by Claimant's counsel: "lifting duct work weighing approximately 500 pounds and felt sharp pain in neck."

Form LS-203, "Employee's Claim For Compensation" signed by Claimant's counsel (Respondent's Exhibit "E"): "Lifting duct work with co-worker, weighing approximately 500 pounds, felt sharp pain in neck and sat down.

July 16, 1976 compensation claim signed by Claimant: "lifting sheet metal duct work with shoulders into

trapese hangars striking neck and shoulders on duct work."

July 25, 1977 report of Dr. Sidhu (Exhibit No. 2, Sanchez deposition): "doing sheetmetal duct work . . . struck neck and shoulder on the steel duct."

Form LS-18, "Pre-Hearing Statement" signed by Claimant's counsel on December 5, 1977: "Lifting duct work with co-worker weighing approximately 500 lbs., felt sharp pain in neck."

Claimant attempted to rationalize his varied accounts of the accident—from "pain while lifting duct", to "struck neck and shoulders while lifting duct", to "struck neck and shoulders on duct while climbing scaffold"—by testifying:

> It was a general type of work we were doing at the time, exactly what I told on that report of the doctor's. It was a generalization of what I was doing when it hit, when I hit my neck (Tr. 98).

In evaluating evidence on the issue of "injury", it is clear that while the Section 20 presumption is inapplicable to the issue of the happening of an accident and while the burden rests with Claimant to prove an accident, *Murphy* v. *SCA/Shayne Bros.*, 7 BRBS 309 (1977), the evidence must nevertheless be construed in a light most favorable to Claimant and all doubts must be resolved in Claimant's favor.

Applying these standards, I find that Claimant sustained no injury within the meaning of Sec. 2(2) of the Act on November 19, 1975, as alleged, and that Claimant and Sutherland gave false testimony as to the happening of an accident.

The record, in my judgment, is free of doubt and permits no other findings as to the credibility of Claimant and Sutherland. Neither Claimant nor Sutherland reported the

accident before leaving the job site, despite the fact that some of the workers had not yet left for the day and the Employer maintained an office in a trailer on the construction site. On admission to the hospital, Claimant (who was conscious and alert) made no complaint of neck and shoulder pain. Neither he nor his wife gave a history of an accident on November 19, 1975, at any time during his five day period of hospitalization, despite extensive treatment by a consulting orthopedist of Claimant's long standing cervical arthritic condition. It was not until several weeks later that Claimant first made mention of a recent accident to Dr. Sanchez, even though he had previously revealed two much earlier accidents. It is simply beyond belief that a recent severe accident would not have been foremost in his mind and disclosed, particularly while receiving treatment in the hospital for the same condition allegedly affected by the "accident".

It was not until his release from the hospital on November 25 that "an injury" first was reported to a representative of the Employer, foreman Fury. I find that this occurred on November 26, 1975, the first day Southerland worked following the alleged accident. Time and attendance records so indicate and Claimant's failure to give a history of the accident while in the hospital indicates that the story of an accident was not constructed until Claimant's release on the 25th.

Claimant's differing accounts of the accident likewise compel these credibility findings. Claimant's explanation that the initial version, "neck pain while lifting heavy duct work," was intended to represent a general statement of the work being performed that day, rather than a description of the "struck neck while climbing scaffold" accident is itself incredible. Had a scaffolding accident been related by Claimant to his counsel, an experienced compensation attorney, in December 1975, he would no more have described a lifting accident than he would have used

the language "while driving a bus" to describe a slip and fall accident on icy bus stairs. One can only speculate why Claimant, at the hearing, (apparently to the surprise of counsel; see LS-18, filed December 5, 1977) gave an entirely different version of the accident, particularly since each version, if true, would appear sufficient to support the claim. Nevertheless, the fact that Claimant gave several significantly different accounts, when considered with other evidence, renders unbelievable his testimony as to the happening of any accident.

Finally, as indicated earlier, Sutherland's testimony that he informed foreman Fury and others in November 1975, that Claimant "had struck his neck and shoulder on the duct" is not credited, as it conflicts significantly with Claimant's own contemporaneous account of a "pain while lifting" accident. In this respect, I credit Fury's testimony that Sutherland reported only that Claimant had been "hurt on the job."

The claim is denied.

ORDER

It Is Hereby Ordered that the claim for compensation be, and the same hereby is, denied.

/s/ William A. Gershuny
William A. Gershuny
Administrative Law Judge

Dated: June 22, 1978
Washington, D.C.

WAG:jps

Office-Supreme Court, U.S.
FILED
MAY 12 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC.,
and
INSURANCE COMPANY OF NORTH AMERICA,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and
RALPH RILEY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

RICHARD W. GALIHER, JR.
GALIHER, CLARKE, MARTELL & DONNELLY
1215 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8330
Counsel for Petitioners

WADE H. MCCREE, JR.
SOLICITOR GENERAL OF THE UNITED STATES
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Federal Respondent

JAMES F. GREEN
ASHCRAFT & GEREL
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400
Counsel for Respondent

PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1980
CERTIORARI GRANTED MARCH 9, 1981

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15.	Respondent's Exhibit B (Insurance Claim Form, dated July 16, 1976)	87
16.	Respondent's Exhibit C (Physicians' Memorial Hospital Record, LaPlata, Md., dated November 20, 1975)	89
17.	Respondent's Exhibit D (Physicians' Memorial Hospital Record, dated March 31, 1977)	101
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21. Deposition of Herbert Wisotsky, M.D., dated May 5, 1978 123

22. Wisotsky Deposition Exhibit No. 1 (Report of Alfred P. Pavot, M.D., dated April 23, 1970) 147

23. Wisotsky Deposition Exhibit No. 2 (Report of Raymond Scalletar, M.D., dated December 9, 1975) 151

24. Wisotsky Deposition Exhibit No. 3 (Report of Leonardo C. Maguidad, M.D., P.A., dated January 21, 1976) 152

25. Deposition of Guillermo E. Sanchez, M.D., dated May 19, 1978 154

26. Sanchez Deposition Exhibit No. 2 (Report of Rajindar S. Sidhu, M.D., P.A., dated July 26, 1977).. 174

The following orders, opinions and judgments have been omitted in printing this Appendix as they appear on the following pages in the Appendix to the printed Petition for Certiorari:

Decision and Order of Administrative Law Judge William A. Gershuny, dated June 22, 1978 ..... 19a

Decision of the United States Department of Labor Benefits Review Board, dated February 27, 1979.. 12a

Order of the United States Court of Appeals for the District of Columbia Circuit, dated May 22, 1980.. 3a

Order of the United States Court of Appeals for the District of Columbia Circuit denying Respondent's suggestion for Rehearing En Banc, dated July 3, 1980 ..... 2a

Order of the United States Court of Appeals for the District of Columbia Circuit denying Respondent's Petition for Rehearing, dated July 3, 1980 ..... 1a

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

RALPH RILEY, *Claimant/Petitioner*

v.

U.S. INDUSTRIES/FEDERAL SHEET METAL,
Employer/Respondent

and

INSURANCE COMPANY OF NORTH AMERICA,
Carrier/Respondent.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Intervenor

Date—Filings—Proceedings

(D)4-24-79—4—Petitioner's petition for review of an order of the Benefits Review Board (m-24)

(D)4-25-79—Certified copy of petition for review was mailed to Richard W. Galiher, Esquire; US Dept. of Labor and Benefits Review Board

(D)5-14-79—Certified Index to Record (n-4)

(D)6-15-79—4—Petitioner's motion for leave to file motion to extend time to file brief and appendix (m-15)

(E)6-21-79—Clerk's order granting petitioner's motion for leave to file motion to extend time to file brief and granting motion to July 6, 1979

(E)6-21-79—4—Petitioner's motion to extend time to file brief—granted

(T)7-9-79—15—Petitioner's brief (m-6)

(T)7-9-79—7—Appendix (m-6)

Date—Filings—Proceedings

(C)8-6-79—4—Respondents' (US Industries/Federal Sheet Metal, Inc., et al.) motion to extend time to file brief (m-3)

(D)8-9-79—4—Motion of Director, Office of Workers' Compensation Programs, for leave to intervene, time having expired (m-7)

(T)8-10-79—Clerk's order that the time for filing the supplemental appendix is enlarged to 20 days from the date of this order and the time for filing respondents' brief is extended until 30 days thereafter

(C)8-15-79—4—Respondents' (Federal Sheet Metal and Insurance Co. of NA) opposition to motion of Director, OWCP for leave to intervene (m-14)

(D)8-15-79—7—Supplemental Appendix (m-15)

(T)9-17-79—15—Respondent's (US Industries / Federal Sheet Metal) brief (m-17)

(E)10-31-79—Per Curiam order granting the motion of the Director, Office of Workers' Comp. Program for leave to intervene and granting their motion to adopt a portion of petitioners brief and dissenting opinion below. The Director shall submit 15 copies of the dissenting opinion in lieu of his brief with appropriate covers and suitably identified. Tamm, Wald (who did not participate) and Mikva, CJ's

(T)11-8-79—15—Intervenor's brief (m-8)

(D)2-27-80—4—Respondent's (US Industries/Federal Sheet Metal) motion for continuance of argument (m-27)

(T)3-7-80—Clerk's order granting respondent's motion for continuance of argument and the argument herein presently scheduled for March 21, 1980 is postponed pending further order of the Court; the Clerk is di-

Date—Filings—Proceedings

rected to reschedule this case for argument during the normal course of the business of his office

(E)4-7-80—Clerk's order, sua sponte, that the following times are allotted for oral argument; petitioner—15 min. and respondent—15 min. Only one counsel per side to argue.

(E)4-25-80—Argued before Wilkey, Wald* and Edwards, CJ's

(H)5-22-80—Opinion for the Court filed by Circuit Judge Edwards.

(H)5-22-80—Ordered and adjudged by this Court, that the decision of the Benefits Review Board is vacated and the case is remanded for full reconsideration of petitioner's claim, in accordance with the opinion of this Court filed herein this date.

(C)6-3-80—4—Petitioner's bill of costs (M-29)

(D)6-5-80—15—Respondent's (US Industries/Federal Sheet Metal) petition for rehearing en banc and/or suggestion for rehearing en banc (m-5)

(D)6-11-80—4—Intervenor's motion for leave to file bill of costs, time having expired (m-11)

(B)07-03-80—Per Curiam order that respondents' petition for rehearing is denied; Wilkey, Wald, and Edwards, CJ's

(B)07-03-80—Per Curiam order, en banc, that respondents' suggestion for rehearing, en banc, is denied; CJ Wright, McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva and Edwards, CJ's

(B)07-23-80—Clerk's order granting intervenor's motion for leave to file bill of costs, time having expired

Date—Filings—Proceedings

(B)07-23-80—Intervenor's bill of costs (m-11)—filed per above order

(T)7-28-80—4—Petitioner's motion for allowance of attorney's fees (m-22)

(T)08-05-80—4—Respondents' motion to stay judgment of this Court on attorney's fees and to stay the mandate from this Court for remand by the BRB to the administrative law judges (m-5)

(T)08-05-80—4—Respondents' opposition to motion for allowance of attorney's fees (m-5)

(T)10-09-80—Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 80-518 on September 30, 1980

(B)12-24-80—Per Curiam order that costs in the total amount of $7.00 are awarded in favor of intervenor (Dept. of Labor) and taxed against respondents (US Industries/Federal Sheet Metal, et al.); and that counsel fees in the total amount of $2,422.50 are awarded in favor of petitioner (Riley) and taxed against respondents (US Industries/Federal Sheet Metal, et al.); Wilkey, Wald and Edwards, CJ's

(T)12-31-80—4—Respondents' motion for reconsideration and stay of this Court's order filed December 24, 1980 (m-30)

(B)2-12-81—Per Curiam order that respondents' motion for reconsideration and stay is granted insofar as it seeks reconsideration of this Court's order of December 24, 1980, awarding attorneys' fees against respondents; no attorney's fees shall be taxed against respondents at this time; further ordered, by the Court, that respondents motion for reconsideration and stay is granted insofar as it seeks reconsideration and stay

Date—Filings—Proceedings

of this Court's order of December 24, 1980, granting costs to the intervenor Department of Labor; Wilkey, Wald and Edwards, Circuit Judges (See attached memorandum to order)

(T)03-11-81—Certified copy of order from Clerk, Supreme Court granting the petition for writ of certiorari in SC No. 80-518 on March 9, 1981

(C)03-23-81—Letter from Clerk, SC asking that record be certified and transmitted to SC in No. 80-518

(C)03-31-81—Clerk's order that the Clerk is directed to certify and transmit to the Supreme Court the entire record herein. In addition, the Clerk shall also transmit to Supreme Court the Certified Index

(C)04-01-81—1 volume of original Clerk's File, Original Certified Index, 1 copy of petitioner's respondent's, intervenor's briefs, 1 copy of appendix, supplemental appendix, 1 copy of petition for rehearing and 1 copy of Court's opinion transmitted to Clerk, Supreme Court by messenger

(C)04-01-81—Receipt dated 4/1/81 from SC for material listed in above 4/1/81 entry

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No. 78-DCWC-82

RALPH RILEY, *Claimant,*

against

U.S. INDUSTRIES/FEDERAL SHEET METAL, *Employer,*
INSURANCE COMPANY OF NORTH AMERICA, *Carrier.*

Washington, D.C.
March 20, 1978

• • • • • • • • • • •

[12]

EXCERPTS FROM TESTIMONY

Howard Sutherland

Q. How long have you been a sheet metal worker, Mr. Sutherland?

A. Twenty some years.

Q. Could you describe for His Honor the nature of your occupation, sir? What is entailed in your kind of work?

A. Well, our kind of work is sheet metal work—it is duct work, heating and air conditioning, and ventilation.

Q. Are you required to lift and move heavy weights, sir?

A. Yes, sir.

Q. Could you give His Honor an idea of the size of the metal duct work that you work with?

A. Well, it varies; some of it might weigh 50 pounds, some of it might weigh 700, 800 pounds.

Q. Now, Mr. Galiher has already pointed out in his opening statement that you have been a friend——

MR. GALIHER: Objection.

JUDGE GERSHUNY: The objection will be sustained. Just ask your questions, please.

MR. GREEN: Yes, your Honor.

By MR. GREEN:

Q. Mr. Sutherland, you have been a friend of Mr. Riley's for several years, is that correct?

A. Possibly 14, yes.

[13] Q. And have you riden [sic] to work with him over a period of years, sir?

A. We worked together for approximately 14 years, I would say.

Q. I would like to direct your attention, Mr. Sutherland, to the date of Mr. Riley's injury, November 19, 1975, sir, and I would ask you, where were you working on that day.

A. We were working at Walter Reed Hospital.

Q. And who were you employed by, sir?

A. Federal Sheet Metal.

Q. Who did you ride to work with?

A. Ralph Riley.

Q. All right, sir. On that job site that day, you were working with Ralph Riley?

A. Yes, sir.

Q. What did your job consist of on that day, sir?

A. Well, we were hanging a sheet metal duct up in the ceiling on some trapeze hangers. It was pretty heavy duct; it was about four or five line. Just like I said, it varies; some might weigh 100 pounds, some might weigh 700, 800 pounds. But we had equipment to lit it with, too, you know.

Q. All right, sir. Who was your foreman on that day?

A. Well, a new boy was in here—I don't know his name. He was only foreman one day—no; maybe three days, I guess; two or three days.

[14] Q. Prior to that time, Mr. Sutherland, who had been your foreman and Mr. Riley's foreman, if you know?

A. John Fury.

Q. Mr. Fury?

A. Yes, sir.

Q. Now, you were hanging duct work?

A. Yes, sir.

Q. Where were you working, sir, when Mr. Riley was hurt?

A. I was working on the scaffold beside him.

Q. How big was that scaffold, sir?

A. Approximately four by eight—four foot wide and eight foot long.

Q. All right, sir. And did you have occasion to notice Mr. Riley receiving an injury to his neck?

A. Well, he was moving from the lower level to the top level, and when he raised up to move up, he struck his neck and shoulder against the duct work that was hanging above him, and knocked his hat off. And then he fell on his knees and sat there probably about five minutes, and then he sat down. And he sat down for a few minutes; then I asked him was he all right, and he said he thought he would be all right.

And I asked him could he get off of the scaffold and walk down the ladder, and he said, yes, he could make it. So, he climbed down off the ladder and sat down on some duct work down there. And I started gathering the tools up, because it [15] was pretty close to quitting time, and by the time I got all the tools gathered up and everything, it was time for us to leave, so we left on out there.

Q. About what time was that, sir, when Mr. Riley got hurt?

A. Well, I would say it was somewhere in the neighborhood of 3:00, but I didn't look or ask anybody; somewhere in the area of that.

Q. What was your usual quitting time?

A. Well, we generally start picking tools up—it is according to how many tools you have out. We had quite a few tools out that day—extension cords and electric drills, and different things—and I had to get them up myself. So, I would say, that day, it would probably take me a half an hour or so to get them up.

Q. Mr. Sutherland, when you saw Mr. Riley hit his neck, could you describe for the Court the movement, the physical movement that you saw Mr. Riley make?

A. Yes, sir. You see, what happened: the scaffold was leveled up like this (indicating) on the top level, and then there is a lower level like this (indicating). He was working under the lower level up like this (indicating), and then he struck——

Q. Mr. Sutherland, excuse me, and I am sorry for interrupting you, sir. So the record will reflect what you are [16] saying, you are saying there are two levels to the scaffold?

A. That's right.

Q. And could you indicate for this record the difference in height between the two bottoms of the scaffold?

A. Well, I would say it is possibly about three feet; it was two or three feet.

Q. Difference in height, sir?

A. Difference in height.

JUDGE GERSHUNY: Let the record show that the witness is indicating that the upper level is about five and a half feet high and the lower level is about three feet lower.

THE WITNESS: Approximately that, yes. But he was going from the lower level up to the top level, and when he raised up like that (indicating), he hit his neck. And then when he did, he come down on the lower level like that (indicating). And I said, "Are you all right?" He said, "I think

I will be all right." And then he pushed the rail and sat down on the scaffold.

He sat there approximately, I would say, a good five minutes or so. And then I asked him, "Can you get down off the scaffold or come down the ladder?" And he said, yes. that he could make it down. So, he climbed off from the scaffold and got on the ladder and climbed down the ladder, and like I say, he sat down on some duct work and stuff down there. And while he was sitting there, I gathered all the tools up, and everything.

[17] By Mr. Green:

Q. Mr. Sutherland, what piece did Mr. Riley hit, sir; what did he hit when he came off?

A. Well, he hit the lower line of duct; it was a huge duct.

Q. How much was that duct; do you know how much it weighed?

A. I would say in the neighborhood of probably about 450, 500 pounds, somewhere in that area; around 500 pounds, maybe more.

Q. That line of duct?

A. Yes, sir.

Q. All right, sir. Thank you. What happened after the shift broke for the day; what did you do then?

A. Well, we just come on out and got in the car and come on home.

Q. Did Mr. Riley complain of any problem in the car ride home, sir?

A. Yes, he complained he had—he said he was still a little dizzy and his shoulders were hurting and his neck was hurting a little bit. But, I mean, generally, I figured he would be all right, with something like that happening.

Q. When did you know that something wasn't all right with Mr. Riley; when was the next time you knew that?

A. Well, the next morning, he was supposed to meet me to [18] ride.

Q. What time was that, sir?

A. I would say he would meet me in the morning probably around 5:30, or something like that; between 5:30 and 6:00.

Q. All right, sir.

A. And so, his wife called before I got ready to go to work, and told me that Riley was in the hospital. And I asked her how was he, and she said his neck and——

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THE WITNESS: Well, she told me he was in intensive care, and she really didn't know how he was, but when she took him there, that he was complaining about his neck and his shoulder and his chest and arm hurting. And she didn't know no more until she talked to the doctor.

By MR. GREEN:

Q. After you received that call, what did you do about going to work?

A. Well, when I got to work, I told the guys at work that Mr. Riley had struck his neck and shoulder on the duct, and I also told them that his wife told me that he was in the hospital, intensive care, hurting with chest pains, his arm, and [19] his neck and all. And one of them said, "Well, it is probably a heart attack, or something like that." I said, "Well, I don't know."

Q. Do you have a recollection now, Mr. Sutherland, of who was on the job when you discussed this; do you have a recollection of who you told, sir?

A. Well, I told Fury, for one.

JUDGE GERSHUNY: Could we have a spelling for that person's name?

MR. GREEN: Your Honor, I believe it is F-u-r-y.

By MR. GREEN:

Q. Is that correct, Mr. Sutherland; do you know?
A. I don't know.

Q. All right, Mr. Sutherland. Do you have a recollection of anyone else, sir?
A. Well, just like I say, I told two or three guys. You know how it is on a job—everybody goes talking. And different ones said, "Well, he probably had a heart attack," or something like that. That's as far as I know on that.

Q. All right, sir.

MR. GREEN: I have nothing further, Your Honor.

JUDGE GERSHUNY: Mr. Galiher?

CROSS-EXAMINATION

By MR. GALIHER:

Q. Mr. Sutherland, how do you know that the date that [20] this injury happened to Mr. Riley was November 19th, 1975?
A. Well, we discussed it with Mr. Green, too.

Q. And how did you discuss it?
A. Well, we discussed it when the accident happened and the date it happened, and everything.

Q. When did you first discuss it with Mr. Green?
A. We discussed it with Mr. Green probably about two or three—about three weeks after it happened, approximately, or somewhere in that area. Now, it could be more or less; this is two years away.

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[21] Q. How long had you been working on the job at Walter Reed Hospital before November 19th, 1975?
A. Possibly three to four weeks.

Q. And before that, where had you and Mr. Riley been working?

A. We worked at Chalk Point Power Plant for three and a half years together.

Q. And when did you last work for Chalf Point Power Plant before you came to work at Walter Reed?

A. Approximately six months before.

Q. You had been out of work for six months?

A. Approximately; it varied, I mean, one way or the other.

Q. Had you completed the job at Chalk Point?

[22] A. Correct.

Q. So, after Chalk Point, you were six months out of work, and then the next job you had was at Walter Reed?

A. Could I explain something right there, please?

Q. Sure.

Q. Well, when we got laid off at Chalk Point Power Plant, there wasn't any work available at the time. So, we called in the union hall and went by the union hall and reported that we were out of work. And they placed our names on the list. They said that as soon as work gets available, they would give us a call.

Q. And then it was six months until it became available?

A. Right.

Q. Did you and Mr. Riley work anywhere else in that six-month period?

A. No, sir.

Q. Did you draw unemployment?

A. Yes, sir.

Q. Up until the time that you went back to work?

A. Yes, sir.

Q. Now, you say that on the 20th —was he supposed to ride to your house; is that the way is worked, and then you drove in your car from your house to the job?

A. Not every day now; I mean, we rotated it.

Q. On the 20th, though——

[23] A. That's the day that I drove.

Q. Okay. Now, after you talked to his wife, you say you went to the job and you talked to Fury, Mr. Fury, and you told him two things: First of all, you told him that he had had a—you told them that Riley had struck his neck and shoulder at work. And then, did you also tell him that he had chest pains, and so forth, also?

A. I told him his wife told me that when she took him to the hospital, that his neck was hurting, and his shoulder and down his arm and his chest, and she didn't have no further report on it because he was in intensive care; she hadn't talked to anyone.

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[41] Q. And was this line about five or six feet above your head when you were standing on the lower scaffold?

A. Well, I would say it would be probably about shoulder height, something like that, in order to move the stuff around.

Q. Now, would you describe exactly what you saw Mr. Riley do?

A. Well, we got ready to move up and we were a lot like this facing each other (indicating), and then he got ready to move up on the other scaffold and he bent down like that, and when he went to get up on the other scaffold, his neck hit the duct line and it knocked his hat off. And then he went back down to the same level he was one, back down on his knees. And like I say, he turned around and sat down on the scaffold.

Q. Okay. So, his neck struck the duct line right in the back of the neck?

A. Well, I would say right along here (indicating), back of the neck and shoulder, because it just got his hat like that. If it had hit high, it wouldn't have knocked his hat off, but it hit down low right there, hit down low right there and knocked his hat off.

Q. What was he going to do if this injury hadn't happened to him?

A. He was going to adjust the hangers; in other words, line the duct up.

Q. So, he would have been getting up like this, but there [42] was a duct work here—here, being right above his shoulders—and then, as he moved to get up on the higher scaffold, then that brought his neck into contact with the scaffold, is that right?

A. You lost me on the scaffold. I mean, his neck didn't hit——

Q. You described that he was going to get up three feet, and he is going to put his foot up or his knee up to try to get up to this next line. He was not stepping; he would have to put his knee up because it was too high, isn't that right?

A. Yes.

Q. So, when he put his knee up, then, as he got his knee up on the scaffold, is that when his head struck the scaffold, or was it in the act of moving from the lower scaffold to the upper scaffold?

A. Well, his head never struck the scaffold.

Q. Pardon me; the duct.

A. Well, like I say, when he was going from one level to the other level, the duct he hit was just above the top level, just right above it. And so that is when he went in like that to raise up, when he raised up like that to get on the scaffold, then it when he hit—you know, when he started going up.

Q. Okay. Now, when he hit it, you said, then, he came back down on the lower scaffold again?

A. He never did get on the top scaffold; he tried to. He [43] went back down on the lower scaffold.

Q. Then, he came back down to the lower scaffold and then sat on the top of the scaffold for a few minutes?

A. Well, he came back down on his knees, and then he was on his knees for a second or two, like it had stunned him, or something, you know.

Q. Was he on his knees on the lower scaffold?

A. Yes. He never did get to the top scaffold; he was only trying.

Q. Now, when he got down to the lower scaffold, then you say he sat down?

A. He sat down flat on the scaffold. And I said, "Are you all right?" He said, "Yes, I think I am going to be all right." And then, we talked a few minutes, and then I said, "Well, are you going to be able to make it off the scaffold, down the ladder?" He said yes.

So, he climbed on down the ladder and sat down on a piece of duct down there, and I started gathering the tools up and everything. And then, by the time I got all the tools gathered up, it was time for us to leave and go home.

Q. Now, were there any other Federal employees that you had to check out with before you left?

A. No.

JUDGE GERSHUNY: You don't mean federal employees; you mean any other employees?

[44] MR. GALIHER: Of the employer, Federal Sheet Metal.

THE WITNESS: Now, occasionally, you would go by a little shed there, but that is very rare; I mean, most guys walk right on out the door at quitting time and they don't check in.

By Mr. Galiher:

Q. And this particular afternoon, you didn't check in?

A. No. Excuse me a minute. Checking it—I would like to explain something, too, there. If you are running late, or something like that, you know, packing tools up and stuff like that, if you happen to be running late and go to check in, everybody is gone, so there wouldn't be no need checking in.

Q. What were the hours of work on the job?

A. I think it was 7:30 to 4:00.

Q. Okay. Or, 7:00 to 3:30?

A. 7:00 to 3:30, or something like that. I really forget what the hours were.

Q. Now, during the time that you worked at Chalk Point, had Mr. Riley ever complained to you about his arthritis bothering him?

A. He has mentioned occasionally at times about having arthritis.

Q. Where would the arthritis be: where did he complain about it?

A. Well, he said in the arms, maybe; his elbow hurt him [45] a little bit sometimes.

Q. Did he ever complain to you about arthritis in his neck and shoulders?

A. I can't verify—you know, he never did complain that much, let's put it that way. I mean, he always did a good day's work and he always did his work.

Q. Well, when he did complain and told you that he had arthritis, your best recollection now is that this was somewhere in his arm?

A. Well, really, I didn't question him that much, but it seemed like he did, maybe, have a little problem in his elbow, or something. But, I mean, he never did complain that much.

Q. Had you ever been on any other jobs with him when Mr. Riley was injured?

A. Yes, I was working on Benning Road and he was injured.

Q. How was he injured out there?

A. Well, he stepped on some fiberglass insulation and he slipped on the scaffold and broke two ribs—I think it was two ribs.

Q. And when was that?

A. See, now, I couldn't tell you the date of it. I would say approximately six years ago—five years ago, I would say; five years would probably be pretty close to it.

Q. And do you know how long he was off?

A. He didn't miss any time at all.

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[46] Q. Now, how long did you continue to work for Federal Sheet Metal after Mr. Riley went in the hospital?

A. Very few days, because it was a long ways for me to drive, and everything, and so, I figured that I would just try to find something closer where I wouldn't have to drive by myself so far away.

Q. So, because Mr. Riley wasn't driving with you, you decided just to find a job closer to home, is that right; is that your testimony?

A. Well, I'm saying, regardless, if it had been to anybody else riding together, it is quite a ways to drive by yourself. [47] I'm not talking about quite a ways to drive by yourself, but quite a ways to drive when you can get somebody to ride back and forth with and you get a job closer.

Q. Would you say maybe you worked about a week or so after that; when you say a few days, is that what you are talking about?

A. Well, I would say probably four or five days—I don't know exactly; I couldn't say how long, but it wasn't very many days. It may not even have been five days.

Q. Would you say that it was at least maybe one or two days after he got hurt that you continued to work, or did you stop work the exact date that he stopped work?

A. No; I worked after that. I worked, like I say, maybe three or four days, or five days; I can't remember right off how many days it was, but I know it was a short time.

Q. How about one day; would that be a better estimate?

A. I think it was more than one day, right off the bat.

Q. Now, did you talk to anybody besides Mr. Fury to tell them about Mr. Riley's accident?

A. Well, I talked to Fury about the accident, and after I told him the situation, his wife gave me a report on the phone, you know, that she didn't know what was wrong with him, what kind of shape he was in or what it was—that he was having pains in his neck and shoulder—and I just told people that he was in the hospital, intensive care.

[48] Q. And you told them the day after this incident occurred when you came in, is that right?

A. That's right.

MR. GALIHER: I do not have any other questions, Your Honor.

JUDGE GERSHUNY: Mr. Green?

MR. GREEN: Just one, Your Honor.

REDIRECT EXAMINATION

By MR. GREEN:

Q. Mr. Sutherland, you recall an injury to Mr. Riley's ribs, is that correct, sir?

A. Yes.

Q. And is it your recollection that this man continued to work with broken ribs?

A. Yes, he continued to work with broken ribs at the time; I mean, he was a foreman on the job at that time.

Q. Do you know if he ever made a claim?

A. No; there was no claim, nothing made. Right then, he was doing ladder work at the time; after he had his accident, he was doing a little ladder work, and they just told him to just come on in and they would, you know, keep paying him.

Q. They kept paying him?

A. Yes. He just came in and just, more or less, did light things or whatever little things that had to be done. But he never claimed any injury, or anything like that, as far as I [49] know

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Ralph Riley

DIRECT EXAMINATION

By Mr. Green:

Q. Mr. Riley, would you state your age for the record?

[50] A. Fifty-four years old.

Q. And are you married, sir?

A. Yes, sir.

Q. Do you support any dependents under the age of 18?

A. No, sir. They are all married.

Q. Would you state for the record, sir, your former occupation?

A. Sheet metal worker.

Q. And what local did you work out of, sir?

A. Local 102.

Q. Mr. Riley, would you agree with Mr. Sutherland's statement concerning the occupation of a sheet metal worker, what it entails?

A. Yes, sir.

Q. Would you like to add anything to that description, sir?

A. Well, general sheet metal work is anything that contains anything up to the gauge of ten gauge, and just like you said, it varies by weight, different weights and different types of work—paneling, anything that contains the sheet metal work.

Q. Mr. Riley, I would like to direct your attention, if I could, to the date of your injury, November 19, 1975, and I would like to ask you, sir, for the record, where were you working on that day.

A. Walter Reed Hospital.

[51] Q. And who were you working for, sir?

A. Federal Sheet Metal.

Q. Do you recall how long you had been working for them at this job site?

A. Approximately three weeks to a month.

Q. All right, sir. And on that day, sir, what was the task that you were given to do?

A. We were erecting the duct work and hoisting it into the trapeze hangers for positioning. This was starting out from a machine room, which consisted of five lines coming out at three different levels, and on the three levels that carried the duct work was angle iron; you may have one above and two in the second tier and one in the bottom tier —it varied.

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[55] By Mr. Green:

Q. Could you describe for His Honor what happened to you that caused an injury to your neck on November 19, 1975?

A. Well, we were putting the duct work into position, which after we put the duct work into position, we have to tighten up the bolts and all in order to have a permanent setting for them; it is a starting line of the future duct work coming off of it. So, after we had moved the duct work

in the bottom position into the trapeze, I was proceeding to go up on the second level to tighten up the nuts and setting up the other [56] angle irons on the duct work above.

And when I proceeded to get up to the second level, that is when I struck my neck on the bottom corner of the lower duct work. I fell back on the first level and seen stars, knocking my hard hat off and knocking me back on my knees on the first level of the scaffolding, and then I sat down. I sat there for a while, gathered myself, and that's when Howard asked me—he said, "How do you feel?" And I said, "Boy, I got a rap that time." So, he says, "Can you get down off the scaffold?" I said, "If you will hold the ladder, I'll try to get down off the scaffold."

So, I go down off the scaffold, and we had this heavy iron duct work around the scaffolding, and I sat down on that to gather myself. And he proceeded to gather the tools and the lines and the electric equipment, and stuff like that, and he let me sit there while he gathered the tools up.

Q. You had had problems with your neck before, hadn't you, sir?

A. They diagnosed cervical arthritis back in 1970.

Q. That cervical arthritis, had it caused you reason to give complaint to pain in any portion of your body prior to this injury?

A. It was more like a rheumatism, and I treated it with the medication that I had at different times as rheumatism.

Q. Was there any medication you were taking the day of [57] your injury for arthritis?

A. Indocin; I had some Indocin, so I took a capsule of Indocin.

Q. You took a capsule that day, sir?

A. After the injury.

Q. All right. Who prescribed the Indocin for you?

A. Dr. Wisotsky.

Q. And you have been taking it for several years, is that correct?

A. Just off and on. I used different types, different types of medication.

MR. GALIHER: I would like the record to have the spelling of Dr. Wisotsky from the very beginning, so we can have that correct. It's W-i-s-o-t-s-k-y.

MR. GREEN: That is correct.

By MR. GREEN:

Q. Mr. Riley, after you took the Indocin that day, what did you then do, sir?

A. That evening, just before we left—of course, Howard, he drove.

Q. Do you remember what time you left, sir?

A. Practically everyone had racked up and he was still getting the lines up and locked in the tool box.

Q. When you say "racked up"—excuse me, Mr. Riley—when you say "racked up," sir, what do you mean?

[58] A. Everyone had pretty well cleaned up all the areas and most of the men on the job were gone. They give you five minutes—you can leave, you can come down the ramp at, let's say, five to 4:00. During that time, I don't know whether we were working 7:00 to 3:30 or whether it was 7:30 to 4:00.

MR. GALIHER: For the record, I will stipulate it was 7:00 to 3:30, according to our records.

THE WITNESS: Okay. Well, they changed it because of the traffic situation.

By MR. GREEN:

Q. All right, sir. After you racked up, you indicated that Howard was driving.

A. That is right.

Q. Where did you proceed to, sir?

JUDGE GERSHUNY: Howard, being Howard Sutherland?

The WITNESS: Howard Sutherland.

By MR. GREEN:

Q. Where did you proceed to?

A. We drove to Howard's place. That is where I had my vehicle parked. So, he asked me how bad I was, and said that I didn't feel too good, so I said, "Drive me home." So, he drove me home, and when I got home, my boy was there, and Howard took my boy back to his place and picked my truck up and brought it home.

Q. All right, sir. Since the time of the impact with [59] the duct work, what problem or pain had you been experiencing, if any, sir?

A. None, none, really.

Q. And why was that?

A. Well, I had worked with it for five years and, occasionally, would take medication and continue to work; I never lost any amount of time—very, very little.

Q. Was there anything about this day and this injury that was different than the prior pain you had experienced?

A. Yes, that was the worst; that was the worst hurt I ever had.

Q. Could you explain to His Honor why it was worse?

A. Well, up to the point when I went home, I had these pains in my chest and my shoulders and arms, steady pain. So, I took another capsule.

Q. Let me stop you, Mr. Riley. That steady pain was different than prior arthritis problems you had experienced?

A. Oh, yes; oh, yes, very, very much so; very, very much so.

Q. All right. Could you describe for His Honor where the pain ran?

A. From my neck up to the back of my head, down my arms, and through my chest (indicating).

Q. Did the pain extent to your hands or your fingers?

A. Oh, yes, clear down.

[60] Q. Did the pain extend below the mid line of the lower back?

A. No; it was mostly up in my upper part of my body.

Q. Was it also up in the upper part of your thoracic or your chest area, sir?

A. Yes, sir.

Q. And that was different?

A. That was different.

Q. Did the Indocin cause the pain to stop at all?

A. That it very temporary; not really; it wasn't really strong enough. It was a very mild Indocin; it wasn't no powerful grain of Indocin.

Q. Do you remember what it might have been?

A. Offhand, it was probably the lightest grain Indocin that they have.

JUDGE GERSHUNY: Could we have a spelling for the drug?

MR. GALIHER: I-n-d-o-c-i-n.

MR. GREEN: I will agree with the spelling.

JUDGE GERSHUNY: Thank you.

By MR. GREEN:

Q. Mr. Riley, you remained at home and your boy brought the truck back, the car back?

A. He drove up with Howard and then he brought the truck back.

[61] Q. Could you describe for His Honor what happened the remainder of that day?

A. Well, it was pretty late in the evening and I went to bed; couldn't eat.

Q. What time did you normally retire, sir?

A. Ordinarily, I retired—working like that, I retired about 9:00, ordinarily.

Q. All right, sir.

A. This time, I went to bed about 7:30, 8:00.

Q. What happened then, sir?

A. Well, this extreme pain woke me about 2:30 in the morning. So, I got up, came out in the kitchen——

Q. Excuse me, Mr. Riley. Where was the pain localized?

A. In my arms, my neck, and my chest was tight as a drum; I could hardly breathe.

So, I come out in the kitchen and got a glass of water, and the pain got so bad that I went back and I woke the wife up and I told her about the pain, which I had told her the evening before that. I said, "This is horrible; I can't stand it." So, she drove me to La Plata Hospital, about 13 miles away. And when I got to the hospital, they put me in a holding room, and right away, with my chest pains, they started a cardiogram; my pressure was up.

They held me in the holding room. A cardiologist come on duty—I don't know what time; he was there in the hospital [62] at the time on another emergency treatment. And she give them the family history, which had a little heart problems. So, by doing so and the symptoms that I had and I could hardly breathe, he prepared me for intensive care. He was interested more in that for the protection of me, to get me into intensive care.

Q. Had you ever had any prior heart problems?

A. No.

Q. But there was a history in your family?
A. In the family.

Q. Please go ahead.
A. Then, they put me in intensive care and they wired me up and they monitored me for three days. They administered morphine because the pain was so great. I was still complaining of my neck, my arms and chest. Morphine and valium were used as muscle relaxer. They monitored me for three days, which was all taken clear into the Washington Hospital; from La Plata, it was wired to Washington Hospital Center.

So, on the third day—I had had no visitors—on the third day, the doctor called in—he had talked to me, I will say, probably the second day, and I referred to him about the injury and my arthritis problem—he called in an orthopedic surgeon, which was Dr. Sanchez. They prepared me for X-rays; they took me into the next room, the pre-intensive care room, and he ordered a straight traction.

Q. This was Dr. Sanchez?
[63] A. Dr. Sanchez ordered the straight traction. So, he come in and, of course, took down the history related back, if I ever had any problems back through the times. And I was still administered muscle relaxers, and they kept me in traction for about a day and a half. The pain was so great that they had to take the straight traction off my neck.

Q. Was this pain, Mr. Riley, that you were experiencing the same pain that you experienced that evening in your home, sir?
A. Yes, sir.

Q. And where was the pain localized at that time in the hospital?
A. At that time, it was more so in my neck and my shoulders and arms. The muscle relaxers were taking hold, and they were administered every four hours and kept me pretty well drugged.

Q. Do you have a recollection, even though you were on medication—do you have a recollection now whether or not your chest tightness eased?

A. The chest tightness did ease, because the muscle relaxers are supposed to do that, because it signals the back to release your muscles; that is what they were working on.

Q. All right, sir. When you gave Dr. Sanchez—and for the record, that is S-a-n-c-h-e-z—when you gave Dr. Sanchez your prior history, was there in your prior history any other problems with your cervical spine, your back from any [64] injury, sir?

A. No. It just related back—he said, "Go back. Did you ever have any injury to your neck, specific injuries? Go back as far as, say, 30 years." So, I said the only real instance that I could think of is when I fell off a horse and when I was in the military, and that was 30-some years, and that is how that entered into the record.

Q. You were in the Marines, sir?

A. In the Marine Corps, horse Marines.

Q. And where were you injured when you fell off the horse?

A. Indian Head—it was called the Powder Factory at the time. We rode patrol, 5-R on the horses.

Q. What part of your body was hurt?

A. I had a brush burn on my back. We wore those big sheepskin coats and, of course, the big collar protected my neck. The saddle come loose; the stable mate must not have tightened the cinch up, and the cinch came loose—they had the old cavalry saddles—and when I went down, my foot hooked into the stirrup, and it was a gravel road, and the horse dragged me along the gravel road. The big sheepskin collar protected my neck, but it pulled up—I had a pistol belt on it—it drug me coat up, and what I wound up with was a big brush burn on the lower part of my back.

Q. Any other injury besides the brush burn?
[65] A. No.

Q. In 1969, you had another injury, is that correct, to your shoulder?
A. That is right.

Q. Could you tell us how you occasioned that injury, sir?
A. Well, I fell back off—there was a short ladder, and I fell back against a concrete wall. We were putting a riser duct in. And by doing so, there was a little tumor that had raised up, a soft tumor.

Q. Could you tell His Honor where that was located?
A. It was on my left shoulder.

Q. Where on the left shoulder, sir?
A. The bottom of my shoulder blade.

Q. Was there any problem with regard to your neck and back from that injury?
A. No.

JUDGE GERSHUNY: What was the date of that injury?

THE WITNESS: '69. Let's see——

JUDGE GERSHUNY: Well, that is okay.

By MR. GREEN:

Q. Mr. Riley, you have made an effort, sir, to recollect any injury at all to your back and your neck. Is there any other injury to your back or your neck other than this injury at work?
A. No other injury. That's why when Dr. Sanchez asked [66] me—he said to go back that length of time, any previous.

Q. And you did, sir?
A. Yes, sir.

Q. Did the 1969 shoulder injury limit your work activity at all?

A. No, sir. They just removed the soft tumor.

Q. Were you told to stay off work because of the soft tumor?

A. Just during the time that they took to operate and when they took the stitches out, approximately a week and a half or two weeks.

Q. When you cracked your ribs, sir, at work—do you recall that injury?

A. Yes, sir.

Q. Did you lose any time?

A. A couple of days, and then they gave me one of those rib vests, like; they don't tape you; they use the rib vests. It was a no lost time accident.

Q. You continued to work?

A. Yes, sir.

Q. After Dr. Sanchez put you in the hospital with cervical traction, what was the result of that treatment, sir?

A. He released me on that straight traction, and he sent me up for physical therapy, which was intermediate traction, hotpacks, and ultrasound. Then, about a month later, it got [67] pretty bad, so he had to administer nerve blocks in my neck and shoulders.

During the time I was taking this treatment, it wasn't responding to the regular medication. So, that is when the doctors recommended me for retirement.

Q. Just stop there for a second, Mr. Riley. Who suggested that you retire from your occupation, sir?

A. Dr. Sanchez and Dr. Wisotsky.

Q. Did they give you a reason why they felt you should retire?

A. Yes, sir. The injury left me with limited use movement of my neck, my arms and shoulder, arm palsy and numbness.

Q. Is it true, sir, that those doctors reported their medical opinion to your union pension fund?

A. Yes, sir.

Q. Did they do so voluntarily?

A. Yes, sir.

Q. From the time you were injured, sir, when is the first time you reported—you reported—this injury to your employer?

A. I didn't hear a thing from—it was about three weeks after the injury, maybe three or four weeks after the injury that the BA called me.

Q. Who is the BA, sir?

A. That was Mr. Bettis. He is not the BA now; he was the [68] BA then.

JUDGE GERSHUNY: That's the business agent of the union?

THE WITNESS: Yes, the business agent. And he asked me when I was coming back to work, and I said, "I'm still under a doctor's care," and I said, "I'm waiting to hear from the carrier, from the insurance company." I said that the accident report was filed, and I said, "Would you call out there and find out who the carrier is?"

So, he called out to find out who the carrier was, and he called me back and told me.

By MR. GREEN:

Q. Who did he say it was, sir?

A. It was North America. And he gave me the address. I said that the accident report was filed. Well, that is the only time I talked to him. Then, a week later, I figured—I didn't hear any more word, so that is when I figured I

needed some legal counseling. And that is when I called Howard and asked him to drive me down to your office, and I made an appointment with you to find out where these reports were and why I wasn't getting any response from the insurance company.

Q. Did you have occasion, sir, after seeing me in my office—and I believe that you saw me in my office on December 16th 1975—did you have occasion, sir, to talk with your business agent again about the status of the report on your [69] injury?

A. Yes, sir. I called the BA in order to put him on notice that I was filing against them because I had not heard from the insurance company, or even the company—never made an attempt to find out what the story was.

JUDGE GERSHUNY: I'm not sure I understand what that meant.

MR. GALIHER: Your Honor, I would like the record to be clear, preliminarily, to that. The business agents works for the union. Now, I think that should be clarified.

MR. GREEN: I think Mr. Galiher is free to clarify that, Your Honor, and he, in fact, has.

JUDGE GERSHUNY: Well, at this point in time, would you just expand upon it? He made a reference that he called his business agent to put him on notice of what?

By MR. GREEN:

Q. Mr. Riley, pursuant to your union regulations and pursuant to custom and practice in this locality, when a man is injured, sir, and does not hear from his employer, is it general practice to contact his business agent?

A. Yes, sir. He represents every member of that local.

Q. All right, sir. Did you direct your business agent to act in your behalf pursuant to any collective bargaining agreement by reporting an injury to Federal Sheet Metal or checking on the status of your injury report?

[70] A. Yes, sir.

Q. And did he do that, sir?

A. Yes, sir.

JUDGE GERSHUNY: What is his name?

THE WITNESS: The business agent at that time was Mr. Killin.

MR. GREEN: That is James Killin, K-i-l-l-i-n.

By MR. GREEN:

Q. Is that correct, sir.

A. Yes, sir.

Q. And, in addition, with again checking with your business agent, did you report the injury to your foreman at that time?

A. Well, I would never talk to the foreman. The BA, he notified the superintendent on the job.

Q. All right, sir. But my question was, did you report the injury to your foreman.

A. Not to the foreman; Howard reported it to the foreman.

Q. Do you know who your foreman was at that time?

A. At the time of the injury—at that date, time, we was brought up onto the fifth floor to work those few days, and I did not know the foreman's name. Later, they said it was a fellow by the name of Baren. But he had men bring the duct work over there and the drawings over, and I may have seen him in three days, I may have seen in one, and then I wouldn't have [71] known him.

But our foreman was Mr. Fury, and he carried our names in the book.

Q. Was it practice on that job with Federal Sheet Metal to move you around from one foreman to another?

A. Yes, and they didn't move the names from the book, because, sometimes, we would go right back to the original

foreman. So, we, actually, spent more time with Mr. Fury than we did with anyone on that job.

Q. And, again, so that we can follow from where you were before, you asked our law firm to represent you in a claim, is that correct, sir, in December?

A. Yes, sir.

Q. And we, at your request, filed claim forms on December 29th, 1975 with the Department of Labor?

A. Yes, sir.

JUDGE GERSHUNY: Are you going to offer those claim forms?

MR. GREEN: Your Honor, if I cannot get a stipulation to the effect, I will, but I would rather keep the exhibits to a minimum, if we can, for the purposes of the record.

MR. GALIHER: I think they should be offered, showing the date that the claim was filed, and so forth.

MR. GREEN: You don't have that in your possession?

MR. GALIHER: I don't know.

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[73] MR. GREEN: That as well, sir; especially that. And I would mark that as Claimant's 2 for identification, and I will show that to Mr. Galiher. (Handing document.)

(Whereupon, the document was marked Claimant's Exhibit No. 2 for identification.)

JUDGE GERSHUNY: For the record, would you state what that is and what the date of it is?

MR. GREEN: Yes, Your Honor. It is a claim form prepared by our office dated as received by the Department of Labor, District 40, December 20th, at 12:15 p.m., 1975.

JUDGE GERSHUNY: Thank you. Are you offering it?

MR. GREEN: I am offering it at this time, Your Honor.

JUDGE GERSHUNY: Mr. Galiher?

MR. GALIHER: No objection, Your Honor.

JUDGE GERSHUNY: All right. Claimant's Exhibit 2 is admitted.

(Whereupon, Claimant's Exhibit No. 2 was received in evidence.)

By MR. GREEN:

Q. Mr. Riley, do you have a recollection of you being contacted by the Insurance Company of North America with regard to this injury?

A. The first notice that I received was a letter of a description to fill out of the injury, which was approximately [74] May or June of '76.

Q. As far as you know?

A. As far as I know.

Q. And did you complete that claim form?

A. Yes, sir.

Q. Did you return it to INA?

A. Yes, sir.

Q. Did you hear from them again with regard to your claim?

A. No.

Q. Have you ever received any workmen's compensation benefits as a result of your injury of November 19, 1975, to date?

A. No, sir.

Q. Have you applied for Social Security disability benefits?

A. Yes, sir.

Q. Are you presently receiving a pension disability from your local union?

A. Yes, sir.

Q. Mr. Riley, you have testified that you worked with your cervical arthritis condition; ever since it was diagnosed, you continued to work with it.

A. Yes, sir.

Q. Do you feel that your condition, sir, has in any way [75] interfered with your working ability as a sheet metal worker until the injury of November 19, 1975?

A. No, sir.

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[84] Q. You said that you have had to restrict your activity. Could you indicate to His Honor how you have restricted your activity, sir?

A. I can't push, pull, lift in very moderate activities, because the therapist says when they give me this therapy, any quick movements of my neck, and the arm palsy, which causes the muscles to tighten up, and the numbness—signals from the [85] spine, that is what causes all of that, and I would only damage it more than what it was; it is a deterioration.

Q. Have you limited any physical activity other than pushing or pulling for example, driving a car, going for walks?

A. Walks—I exercise my walking. And as far as driving, very little, because when you hold a steering wheel, you are putting stress on the nerves and it signals back to your spine, and that is what tightens up, which causes the arm palsy, and that is very limited.

Q. What medication are you presently taking, Mr. Riley?

A. Motrin.

Q. Anything other than Mootrin, sir?

A. And the valium, in order to sleep at night, which with the pressure on my spine, my arms go to sleep, go numb.

Q. How often does that occur, sir?

A. All the time. The medicine is only temporary.

Q. Does any particular activity occasion the arms going to sleep?

A. Oh, yes. Anytime that I put any amount of stress on them, or even just like driving an automobile; when you are gripping the steering wheel, anytime you grip anything that is when you get the numbness and the tingling back into your neck, where it signals out—that is the way he explained it—that the nerves are signaling for the muscles to tighten up, and that it what causes the palsy.

[86] Q. Beyond driving the car, pushing and pulling in other activities, is there any other activity that this injury to your neck has caused you to refrain from, sir?

A. Well, I just can't do anything, even minor—I tried to do even some minor yard work, and I landed in the hospital, and I was in straight traction in the hospital for 11 days in the spring of '77 by just picking a bag of mulch, sliding a bag of mulch off a wheelbarrow. And I asked them. I said, "Well, why was that?" He said, "That is putting"——

MR. GALIHER: Objection.

JUDGE GERSHUNY: You may answer.

THE WITNESS: Beg your pardon?

JUDGE GERSHUNY: You may answer.

THE WITNESS: He said, "That is putting the stress on it," and that I was favoring my neck. And by favoring my neck, it is putting more strain on my lower back section.

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[88] CROSS-EXAMINATION

By MR. GALIHER:

Q. Mr. Riley, when you had your injury in 1969, did you report it to your employer?

A. Yes.

Q. How did you do that?
A. Well, I called them by telephone.

Q. And was that within several days after the injury occurred?
[89] A. No. Actually, I went to the compensation doctor, stopped by a compensation——

Q. Compensation clinic?
A. Clinic, clinic.

Q. And did you report it after you had been to see them, is that how it worked?
A. That's the way it went from there.

Q. You are aware that there is a requirement under the law to report an injury when it happens to your employer?
A. Yes, sir.

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[92] Q. How often since the year 1970, up until the year 1975, did you go to see Dr. Wisotsky for your neck problem and your shoulder problems?
A. Very little; it was mostly for, say, general health. I had a cholestrol problem and he monitored my weight, and he would issue me some arthritis pills.

Q. Who gave you the Indocin that you have been taking since 1970?
A. I haven't taken Indocin since 1970; I have taken differrent medications.

Q. Who prescribed those medications?
A. Dr. Wisotsky.

Q. Now, you say on the day this injury occurred that you had Indocin in your pocket.
A. I carried it in my tool box.

Q. And had you been taking Indocin before this injury?
A. No. I treated it just like I had a rheumatism.

Q. Well, had you been taking Indocin, then, on a regular basis?

A. No, not on a regular basis. All that Indocin is—it is a pain killer.

Q. Well, how often, let's say, within the year before November of 1975, had you taken Indocin?

[93] A. Oh. Occasionally, maybe six months—oh, off and on. Sometimes, I used just a Bufferin on an Anacin.

Q. Well, would your taking of the Indocin depend upon whether you, for example, were working in wet weather or damp weather; would that bring on some symptoms that would cause you to take Indocin?

A. It would be more like a rheumatism.

Q. Okay. Would the weather cause you to have symptoms that would then require you to take the Indocin?

A. I don't know. I guess it has a certain amount of factor to it.

Q. Now, on the day that this incident happened, you have shown us the scaffold and you have indicated that you were trying to go up to the upper level. Now, you had placed this duct that you struck up in the ceiling in the first instance, had you not?

A. Yes, sir.

Q. And had you done it that same day?

A. Yes, sir.

Q. And were the duct jacks still holding it up in the ceiling, or had they been removed because of the trapeze situation?

A. That's right; it was removed, so we could push our scaffold underneath it to do the adjustment.

Q. Now, had you ever climbed from the lower scaffold to [94] the upper scaffold before the time that you climbed up this particular time and struck your neck?

A. Many times.

Q. Why is it that this particular time you struck your neck, as opposed to not having struck it any of those other periods of time?

A. It could have been the way the positioning of the scaffolding was—in reference, underneath the duct work. I have worked on scaffolding all through my time from different levels; some have three different levels that you climb up.

Q. Well, did you realize when you were climbing up from the lower to the upper level that that duct work was, in fact, there?

A. Definitely, it was there.

Q. Well, did you realize it?

A. That the duct was there?

Q. Yes.

A. Definitely; I was working on it.

Q. Well, how is it that—did you slip, or something like that, as you went up to get to the upper level, and is that what caused you to come back against the duct work?

A. I must have lost my balance to a certain extent.

Q. Had that not happened, you would have been able to clear it as you had on other occasions?

A. I would say.

[95] Q. Was there enough head room, except for that, for you to move from the lower scaffold to the upper scaffold?

A. I would say so.

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[97] Q. Who was your main foreman?

A. Fury.

Q. Fury?

A. Yes. He is the one that carried our names in the book.

Q. Now, what about Mr. Fred Gunnell; what connection was he to this job?

A. I don't even know the man; when you brought him the last time, I didn't know him. The name don't ring a bell.

Q. Now, when you called—strike that. When you were taken to the hospital at La Plata, were you conscious when you went in the hospital?

A. My wife drove me.

Q. Okay. When you went into the hospital, did they ask you what happened, and so forth?

A. I was in so much pain that my wife did most of the answering of the questions. They were interested in my history, what was causing it, and this is why they brought the cardiologist down who was there on another emergency case—he happened to be in the hospital; he is the chief cardiologist in La Plata Hospital.

Q. When you got home on November 19th, did you tell your wife that you had suffered an injury at work?

[98] A. Yes, sir. I told her I hit my neck on the duct.

MR. GALIHER: Can I see Claimant's Exhibit Number 1, Your Honor, please?

JUDGE GERSHUNY: Claimant's Exhibit Number 1 is on——

MR. GALIHER: The claim form; this is what I need.

JUDGE GERSHUNY: That's Number 2.

MR. GALIHER: All right. Claimant's Number 2.

By MR. GALIHER:

Q. Is this your signature, Mr. Riley? I am showing you what has been marked as Claimant's Exhibit Number 2.

A. Yes, sir.

Q. On this claim form that you signed when you met with Mr. Green, this, presumably, was signed somewhere around the date it was filed, which was December 29th, 1975. This

says as follows, quote: "The accident occurred when I was lifting duct work weighing approximately 500 pounds and felt sharp pain in neck," period, end quote.

Did you tell your attorney at that time that you had, in fact, struck your neck against the duct work?

A. It was a general type of work we were doing at the time, exactly what I told on that report of the doctor's. It was a generalization of what I was doing when it hit, when I hit my neck.

Q. Well, why was it——

A. See, I've got to explain this here.

[99] Q. Yes, I would like you to explain that. I'll phrase it with a question.

Why didn't you say in that claim form that you had struck your neck against the duct work, as you and Mr. Sutherland have testified here today?

A. That's exactly what it was, and then when I filed your form out in the spring of the year, I had put that into the description.

Q. You did.

MR. GALIHER: I would like this form to be marked as Employer's Exhibit B.

(Whereupon, the document was marked Respondents' Exhibit No. B for identification.)

JUDGE GERSHUNY: For the record, would you just indicate generally what that is.

MR. GALIHER: Okay. Your Honor, this is an Insurance Company of North America form for a workmen's compensation claim; it is signed by Mr. Riley, dated 16 July, 1976.

JUDGE GERSHUNY: July——

MR. GALIHER: 16, '76. I would like it to be marked as Exhibit B, and I will ask Mr. Riley to identify it and his

signature, and the fact that this is probably his writing, and so forth, on the form.

By Mr. Galiher:

[100] Q. Mr. Riley, is that the form you filed out that you are talking about in your previous testimony a minute ago?

A. Yes. See, this covered the general——

Judge Gershuny: Yes or no? I didn't understand the answer. Yes?

By Mr. Galiher:

Q. Just yes or no. Is that the form we are talking about, sir?

A. Yes, sir.

Q. Okay. And does that bear your signature?

A. Yes, sir.

Mr. Galiher: Fine. I would move that into evidence at this time.

Mr. Green: I have no objection, Your Honor.

Judge Gershuny: Okay. Respondents' Exhibit B will be admitted.

(Whereupon, Respondents' Exhibit No. B was received in evidence.)

By Mr. Galiher:

Q. Now——

Judge Gershuny: Would you just wait for one moment, please, and let me look at this? (Perusing document.)

By Mr. Galiher:

Q. Now, Mr. Riley, when you got to the hospital, you say that—can you tell me whether it was your wife that

told them [101] what had happened, or was it you that told them what happened?

A. All she gave them was the family history.

Q. Now, she knew at the time that you were admitted to the hospital, of course, that you had had this injury, because you had told her?

A. That's right.

* * * * * * * * * *

[108] By Mr. Galiher:

Q. Now, Dr. Sanchez first saw you in the hospital several days later, was it?

A. When Dr. Burke called for an orthopedic surgeon; three days.

Q. Okay, Now, when you first saw him, did you tell him about your injury to your neck?

A. Yes, sir.

Q. And did you also tell him that you had forgotten about telling the hospital about it on your original admission?

A. I think I did; I think I mentioned it. I was in straight traction then and pretty well hopped up. I think I did.

Q. Now, Dr. Burke is listed as the treating physician for you in the hospital. Had he ever treated you before you were hospitalized?

A. No, sir.

Q. Did Dr. Wisotsky treat you in the hospital at all?

A. No, sir.

Q. Not at all?

A. No, sir.

[109] Q. And you never saw him until after you got out of the hospital?

A. That's right. My record was forwarded from Dr. Burke to Dr. Wisotsky.

Q. Now, was that letter that I showed you that you signed for INA the first time you had ever written anything about this accident to INA?

A. INA?

Q. Yes.

A. Who is INA?

Q. To the insurance company, Insurance Company of North America.

JUDGE GERSHUNY: Why don't you show him the form? It is not a letter; it is a form. I think he may not understand what you are referring to. It is Respondents' Exhibit B.

By MR. GALIHER:

Q. Let me show you what has been marked as B, and ask if that is the first time you ever wrote anything to INA about how this injury occurred.

A. (Perusing document.) Yes, sir.

Q. Now, did you ever, yourself, personally, while you were in the hospital or after you got out of the hospital, call anybody connected with the Federal Sheet Metal to report your neck injury?

A. No. The understanding was that Howard Sutherland took [110] care of it. And during the time I got out of the hospital, I was restricted, really, house-bound, because of the medication I was taking, and it wasn't until about a month later—that I wasn't hearing anything from this—when I heard from the business agent, and he asked me when I was coming back to work. And to my surprise—I told him, "Why are you asking me if I am coming back to work, because I was injured on the job and I am waiting for Federal Sheet Metal or the insurance carrier in order to get in touch with me because I was under a doctor's care."

Q. Now, let me go into that a little bit. The business agent of the union——

A. That's right.

Q. —called you on the phone. You didn't call him?

A. No, sir. First of all, Blackie, the superintendent——

Q. Who?

A. —from Federal Sheet Metal——

Q. Blackie is who—Fury?

A. No, no. He is the general superintendent; Blackie Brandsfield. He called the business agent and the business agent, in turn, called me.

Q. Okay. So, he called the business agent and asked when you were coming back. Then, the business agent called you.

A. That's right.

Q. So, it is obvious, then, that neither Blackie nor the [111] business agent knew that you had been injured.

A. That's why—the injury, as far as I knew, was reported, and that's what surprised me.

Q. Well, you felt that it had been reported by your friend Howard Sutherland.

A. That's right. And he told me that he reported it.

Q. When did he tell you that he had reported it? I mean, when did you first have a discussion with him about the manner in which he reported the injury and who he reported to, and so forth?

A. I'll say about a week after that; about a week after I heard from the BA, I called him, and that's when I asked him about the injury and if he reported it, and he said, Yes." And I said, "Well, I haven't heard anything from the insurance company, and the only word I got about anything was from the BA." And that is when I asked him to drive me downtown to seek counsel.

Q. Did Mr. Sutherland advise you who he had reported it to?

A. He said to our foreman, who was Fury.

Q. And did he tell you when he had reported it?

A. The next day he went to work.

Q. And did you get the impression that that was the day after this incident occurred?

A. Yes, sir.

[112] Q. Were you aware whether, after you went off the job, Mr. Sutherland ever worked for Federal Sheet Metal again?

A. You mean, after what?

Q. After you had been put in the hospital on the 20th. Did you ever in your conversations with Mr. Sutherland become aware that he had gone back to Walter Reed Hospital and worked one, two, three, four days?

A. Yes. He said he had stayed out there for about a—I understood for about a week, and then he left. And the reason why he left, he said, was the drive.

Q. When the business agent had this conversation from you and you told him that you were trying to find out about the injury, then did he indicate that you should do something, or was he going to do something about it at that point in time?

A. That's when I asked him about the carrier, and then he, in turn, returned a call to the superintendent and got the carrier's name, because I was surprised that I didn't hear a word.

JUDGE GERSHUNY: Is the record clear, Mr. Galiher, when this conversation occurred?

MR. GALIHER: No, it is not, Your Honor.

JUDGE GERSHUNY: I think it might be helpful if you would clarify that.

MR. GALIHER: I was coming to that.

By Mr. Galiher:

[113] Q. Could you tell us when this conversation took place?

A. I would say it was about December 12th or 15th.

Judge Gershuny: It was prior to the time that you met with your lawyer?

The Witness: Yes, sir.

Judge Gershuny: Thank you.

By Mr. Galiher:

Q. Is Killin, K-i-l-l-i-n, the man you talked to?

A. That's right.

Q. And Mr. Killin, the business agent, then advised you to seek counsel at that time?

A. No. That was after I seen counsel.

Q. Well, wait a minute. We are trying to clear up that right now. Was it before or after you saw Mr. Green that the business agent first called you?

A. Oh, no, no, no. Now, you see, you've got two different business agents.

Q. Oh, okay. Well, that is what is unclear. Do you want to clear us up on that?

A. I told you. Jim Bettis is—we have three business agents. Jim Bettis is the one that called me about the 12th or 15th of December.

Q. Okay. And he called back and said INA was the carrier?

A. That's right. I wanted the info——

Q. And where did Mr. Killin come in?

[114] A. —to give to the doctor.

Q. Okay. Where did Mr. Killin come in?

A. Then, after I didn't hear no word, the doctor submitted the—I asked the doctor to submit the report; I was

going through physical therapy at the time, and I asked him if they had heard anything. That was in December, when I was going through physical therapy.

Q. And you asked them to submit a report to INA?
A. That's right.

Q. And then, did there come a time that he advised you that he had submitted a report to INA?
A. Yes, sir.

Q. Do you know if—strike that.

MR. GALIHER: That is all I have at this point, consistent with the liability.

JUDGE GERSHUNY: I have one or two questions just so the record will be clear.

Mr. Riley, was this duct work round duct or was it square duct work?

THE WITNESS: It was rectangle; some square, some rectangle, some had round ends on it; it changed from different sizes.

JUDGE GERSHUNY: And how high above the top level of this scaffold that you were trying to go up on—how much higher than that was the bottom of the duct work that you hit [115] your——

THE WITNESS: From the top level?

JUDGE GERSHUNY: Yes.

THE WITNESS: I would say approximately three foot, I guess; it was about three foot from the first level to the second level, and about three foot from there up to the bottom of the big duct.

JUDGE GERSHUNY: And what were you going to do when you got up to the top level?

THE WITNESS: We were going to make adjustments. You had three sets of trapeze that was carrying these three sets

of lines that had five lines in them. When these long all-thread rods came down, you had to set nuts on them, and that would bring us up to elevation; we had elevations to maintain and measurements from our measurements columns, from our measuring line. Then, we would have to set them into position and lock them in so that they wouldn't move, so that whoever run the duct work from there, that would be the starting point; that would be what they called the cut line, but that line stayed, because it was all drafted out to fit exactly, and if it was back a couple of inches or forward a couple of inches, then it wouldn't hit your inserts right.

JUDGE GERSHUNY: What was your understanding as to what kind of notice of injury was required?

THE WITNESS: Within the 24 hours.

[116] JUDGE GERSHUNY: Was your understanding that it had to be oral or written?

THE WITNESS: No, just notify them that the injury took place.

JUDGE GERSHUNY: And what was the practice on these job sites as to who you would notify?

THE WITNESS: You would notify your foreman, and then he would make the report. He would carry the report from there to the superintendent's office.

JUDGE GERSHUNY: Mr. Green, do you have any further questions?

MR. GREEN: Based on yours?

JUDGE GERSHUNY: No; generally, on the issue of liability.

MR. GREEN: On the liability, yes, sir, I do.

REDIRECT EXAMINATION

By Mr. Green:

Q. I show you what has been marked for identification as Claimant's 2. Do you recognize that claim form, sir?

A. Yes.

Q. You had completed a section of the claim form, which was then typed in, indicating that while you were lifting duct work weighing approximately 500 pounds—"felt sharp pain in neck." Is that correct, sir?

A. Yes.

[117] Q. You just testified in response to His Honor's question that your job occupation was, quote, "moving duct work," end quote.

A. That's right.

Q. Is that a general description, sir, that you use to describe your activity; that is, your general work activity?

A. That's right.

Q. I show you, sir, Respondents' Exhibit B, I believe, yes, B. And this form, you completed for INA insurance?

A. That's right.

Q. Would you read for the record what you have indicated where the question is asked on the form, "Describe fully the nature and extent of injury and how same was sustained"; what did you say, sir?

A. "Lifting sheet metal duct work with the shoulders into trapeze hangers, striking neck and shoulders on duct work, aggravating existing cervical arthritis."

Q. All right, sir. There, you had used the term "moving," is that correct?

A. Right, sir.

Q. "With shoulders"?

A. That's right.

Q. What did you mean by that, Mr. Riley?

A. That is after the duct work was in the trapeze; that is the way you got them in line. And after we got them in line, [118] I was going up into it to make a setting, the lock setting.

Q. Could you describe for His Honor how you physically make a setting, which is referred to as bulwark? [sic]

A. Well, after you get them into the racks, then two men, one on each side, have to lift one end and slide it—it depends on the weight of the duct, because you have no duct hoist; you have no duct hoist then; they are out—the scaffold is there; you are working off the scaffold. And you slide them into position; you have marked on your angle iron where you have to move them in. Sometimes, you even have to use a two-by-four, and all; something that you have to spring them into position.

Q. When you indicated on this form that you were moving with your shoulders, is that physically how you move angle iron weighing 500 pounds?

A. The duct work?

Q. Yes, sir.

A. Yes, sir.

Q. That is what you physically do?

A. After you get it into the hangers.

Q. All right, sir. What were you told—strike that. What information did you gain about Federal Sheet Metal's concern about where you were from your business agent; what did you understand their concern to be, sir?

Mr. Galiher: Objection. I am going to ask for a clarification of that question.

[119] Judge Gershuny: What is it that you are trying to show with this question?

Mr. Green: Your Honor, a proffer at this time would be this: If Federal Sheet Metal, the Employer, has knowledge

or an injury, or knowledge of an absence from work, and they initiate a contact to the business agent; he finds out what the problem is, reports it to them, then that may be an additional notice to the Employer of a work-related injury.

JUDGE GERSHUNY: I'm going to, I think, sustain the objection. I think it is a critical point. I think the business agent is here in town, and if you want to establish what the Respondents said to one of the two business agents, I think that you should establish it through them and not through this witness. It is really double or triple hearsay; I haven't figured it out yet.

By MR. GREEN:

Q. Mr. Riley, what did the business agent say to you, sir, when he called the first time?

A. He asked me when—Blackie Brandsfield had called him and asked him when I was going to return to work, whether they were going to hold my job open or not. And that is what really surprised me.

Q. What did you say to your business agent?

A. I said to the buseiness agent that I was waiting for the report from the insurance company or the contractor to find [120] out anything about the injury; that Howard had made the report on that day and I hadn't heard anything from them. And I said, "I'm still under a doctor's care. The doctor is submitting a report to send to the insurance company. I would like to know the carrier's name."

So, he, in turn, called out and got the carrier's name, and then recalled me. And that was the extent of the conversation.

Q. His name, again, sir?

A. Mr. Bettis.

Q. Is he still a business agent with the local?

A. No.

Q. Where is he now, sir?

A. He is in town.

Q. Is he retired from the local?

A. No.

Q. Do you know if he is still doing sheet metal work?

A. Yes, sir.

Q. Did you make a second call to a business agent?

A. The second call made to the business agent was to—I called for Jim Bettis, but he wasn't in, and then, Jimmy Killin, who is the other business agent, answered the phone—that was about a week or so later, and that is during the time that I called Howard to come down and that is when I come down to seek counsel. And I referred to him—to go on notice that [121] I was filing against Federal Sheet Metal for the injury.

And so, he called me back and verified it; that he called Blackie Brandsfield to go on record at that time. And that was the extent of that conversation.

Q. All right, sir. Did you have any reason to believe that Federal Sheet Metal was not on notice of your injury?

A. No; that is what surprised me.

Q. Have you ever had any reason to believe that Federal Sheet Metal was not on notice of your injury at work?

A. No, sir.

Mr. Galiher: Objection. I let the first question in. The second question—this is a legal matter at this point.

Judge Gershuny: Overruled. This is what is in his mind.

Mr. Green: Thank you, Your Honor.

The Witness: May I say something?

Mr. Green: All right, sir.

THE WITNESS: If I wouldn't have known that the accident was not reported, I would have not had the doctor—to get the information for the carrier—for the doctor to send the report directly to North America.

MR. GREEN: I have nothing further, Your Honor, based on cross or any of your questions.

JUDGE GERSHUNY: With regard to this phase?

[122] MR. GREEN: With regard to this phase alone.

MR. GALIHER: I have two other questions.

RECROSS-EXAMINATION

By MR. GALIHER:

Q. Did you ever tell Dr. Sanchez, when you first saw him, that you had struck your neck against the duct work?

A. Yes, sir.

Q. Do you know why, in his report, which I think is A—is it A?

JUDGE GERSHUNY: It is Respondents' A.

By MR. GALIHER:

Q. Do you know why he says in his report that—referring to the paragraph at the bottom of the page—that you were doing stock work at Walter Reed Army Medical Center in 1975, moving duct work into position when you felt a pain at the base of your neck?

A. Well, that's where—we weren't doing stock work. What they meant was we were stacking duct, and that was in the racks. After I read that there—that was stacking, stacking duct in the racks.

Q. He doesn't say in this report that you had struck your neck against the duct work. He says that you were moving

the duct work into position when you felt pain at the base of your neck.

A. Well, he's writing and I am in traction.

[123] MR. GALIHER: Let me have this marked as Number ——.

JUDGE GERSHUNY: E.

(Whereupon, the document was marked Respondents' Exhibit No. E for identification.)

JUDGE GERSHUNY: Would you state what it is first, so we can have a clear record?

MR. GALIHER: This is LS-203 form, dated December 16th, 1975, bearing Mr. Green's signature, with a——

JUDGE GERSHUNY: What is the date, again? I'm sorry.

MR. GALIHER: December 16th, 1975. I don't know the date that it was filed at the Deputy Commissioner's Office; maybe I can find that out during lunch. This is the standard form of compensation. It is not signed by Mr. Riley, but I would like to ask him about it.

By MR. GALIHER:

Q. Mr. Riley, let me show you what has been marked as Exhibit Number E, and ask if you have ever seen that or have you ever signed a copy of a form similar to that form for Mr. Green.

A. (Perusing document.) It is a little different looking form! I don't think so, no.

JUDGE GERSHUNY: I don't think that you were heard by the reporter. Did you get what he said?

THE REPORTER: He said, "I don't think so, no."

[124] THE WITNESS: Is this the same form?

JUDGE GERSHUNY: Wait a minute; wait a minute.

By Mr. Galiher:

Q. I want to ask you if you have ever signed a form similar to that. That does not bear your signature, but have you ever seen that before?

A. I can't say.

Mr. Green: Your Honor?

Judge Gershuny. Yes, sir, Mr. Green?

Mr. Green: So that the record will not become any more unclear, since I have filed that form, it might be good if I proffer to the Court why it was filed and the time and place that it was filed and the reasons, under local regulation, District 40, why it was filed.

Judge Gershuny: When we recess for lunch, why don't you tell that to Mr. Galiher and perhaps you can stipulate as to what the document is.

Mr. Green: All right, sir.

Mr. Galiher: Fine. Well, we will just have that marked as the E number, and I won't move it into evidence until after I have discussed it with Mr. Green.

By Mr. Galiher:

Q. You have indicated that you never saw Dr. Wisotsky until after you got out of the hospital. Did you tell him, when you first saw him at that time, about this injury in November of [125] 1975?

A. Yes, sir.

Q. And that would have been, perhaps, January, maybe, February of 1976 that you saw him for the first time?

A. It would have been in December, sometime, I would say. Yes, it would have been in December.

Q. Okay. Did you ever have occasion to call, or request your wife to call him to see you while you were in the hospital?

A. No, no. See, he is a family doctor; he is a practitioner; who was handling me were specialists.

Q. Dr. Burke is what kind of a physician?

A. He is a cardiologist.

Q. Is he? Okay.

A. Sanchez is an orthopedic surgeon.

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[130]

Austin Fred Gunnell, Jr.

Q. Did you ever have occasion to talk to Mr. Fury at that same time?

A. Yes, I believe I did.

Q. Did you inquire of him whether or not he had received any accident report?

[131] A. I can't quite remember, to be honest with you. To be honest with you, I really don't know. I am being perfectly honest with you.

Q. But you never received an accident report?

A. No.

Q. Either from Mr. Sutherland or from Mr. Riley, directly or indirectly, is that right?

A. No; that is true.

Q. When you were contacted by Mr. Ferris about a possible accident that may have occurred, was there any indication given to you as to what type of an accident was being claimed, or anything like that, at that time?

A. I believe Mr. Ferris said something about he had hurt his shoulder lifting something, or to that effect. I believe that is what he told me.

Q. And that was what was being claimed at that time?

A. I believe that is what he told me at the time. He had developed some problems afterwards; he did tell me that.

* * * * * * * * * *

Ralph Riley (continued)

[180] By MR. GALIHER:

Q. Mr. Riley, can you tell us the date that you first requested retirement from the union, or requested a physician to write a report for you in connection with that retirement?

A. Dr. Sanchez recommended to Dr. Wisotsky that I couldn't perform anymore work, because it was a danger to me and it endangered anyone working on the job.

* * * * * * * * * *

[188] I would like to ask one other question on liability, Your Honor. It concerns the foreman situation. I would like to ask the question and then Your Honor can rule on, if there is an objection. I would like to ask him whom he felt that his foreman was at the time this injury occurred.

A. Fury.

Q. Mr. Fury was your foreman?

A. That is right. He paid us.

* * * * * * * * * *

By JUDGE GERSHUNY:

[197] Mr. Riley, you have worked on jobs as a foreman, haven't you?

THE WITNESS: Yes.

JUDGE GERSHUNY: Have you worked as a foreman frequently?

THE WITNESS: I would say average. Our of 26 years, I would say half and half.

JUDGE GERSHUNY: Is that based upon your seniority in the local?

THE WITNESS: No.

JUDGE GERSHUNY: While you have been foreman, have you ever received notices of accidents or injuries?

[198] THE WITNESS: Yes, sir.

JUDGE GERSHUNY: Is it a fairly uniform practice, regardless of which job site you are on, that the notice of injury is given to a foreman and then the foreman immediately notifies the superintendent?

THE WITNESS: Yes, sir.

JUDGE GERSHUNY: Did you specifically ask Mr. Sutherland to tell the foreman that you had been injured?

THE WITNESS: I was in intensive care. The only one he talked to that morning was my wife. They didn't give me no visitors.

JUDGE GERSHUNY: And you were in intensive care for several days?

THE WITNESS: That is right.

* * * * * * * * * *

George Mistretta

By MR. GREEN:

[203] Mr. Mistretta, would you please take the stand and wait to be sworn?

Whereupon,

GEORGE MISTRETTA

[204] was called for examination and, having been first duly sworn, was examined and testified as follows:

JUDGE GERSHUNY: Would you spell your last name, please, and would you state by whom you are employed?

THE WITNESS: M-I-S-T-R-E-T-T-A.

JUDGE GERSHUNY: By whom are you employed?

THE WITNESS: Office of Workers' Compensation Programs.

JUDGE GERSHUNY: That is with the U. S. Department of Labor?

THE WITNESS: That is right.

JUDGE GERSHUNY: You may proceed.

* * * * * * * * * * *

Q. In your course of duties as a Claims Examiner for the Department of Labor, were you assigned a file, OWCP Number 100376, concerning a Ralph Riley versus U. S. Industries/Federal Sheet Metal and Insurance Company of North America?

[205] A. Yes, sir.

Q. Mr. Mistretta, have you brought that file with you this morning?

A. Yes, sir.

Q. Is that file the official United States Department of Labor record?

A. Yes.

Q. You are not here pursuant to a subpoena, is that correct, sir?

A. Right.

Q. I would ask you, if you would, to review your file and, for purposes of this record, turn to the first indication in the official file of a claim being filed by Mr. Riley.

A. The first notice we had of Mr. Riley's claim was your letter dated December 29, 1975, and received in the Bureau office the same day. Attached to that letter—and a copy of that letter went to the Insurance Company of North America, 5225 Wisconsin Avenue, Washington, D. C.

Accompanying that letter is a retainer signed by Mr. Riley, which also engulfs a claim.

JUDGE GERSHUNY: What was the date of that letter?

THE WITNESS: December 29, 1975.

JUDGE GERSHUNY: Thank you.

By Mr. Green:

Q. All right, sir.

[206] What is the next information that your file contains with regard to this claim?

A. Let me give it to you in sequence.

When that came in, it was referred to our section where the files are made up, and I can't tell you when I got that back, but it was after the first of the year.

March 10, 1976, I wrote to the Insurance Company of North America, requesting they forward to us an Employer's First Report of Accident or Occupational Illness Form, and Attending Physician Form, Notice of Compensation to be Paid Without Award Form, 208 Form, Final Payment; then Form 210, which is a Supplemental Report as to when the man was able to return to work, or when the compensation was terminated, if paid.

I received no reply, and on May 20 I again wrote the Insurance Company, requesting the same information, and on the letter itself, or the form, as I remember, I put "second request, please comply."

I received no reply, and on June 28 of the same year, 1976, I called Ms. Phillips.

Q. Who is Ms. Phillips?

A. She is a Claim Representative of the Insurance Company of North America, and requested Employer's First Report of the Accident and whatever the status of the case may be, and she said they didn't have one—didn't have the Employer's First Report, but she would call back.

[207] On June 30, two days later, I called Mrs. Hunter of the Insurance Company of North America, who is Ms. Phillips' supervisor, and she stated that she contacted the Employer, and they have no knowledge of the Claimant's sustaining an injury, and they were sending in a negative Employer's First Report of Accident.

The next thing we received, sir, was a controversion form sent out by the Carrier.

JUDGE GERSHUNY: What was the date of that form?

THE WITNESS: They did not date it.

JUDGE GERSHUNY: When was it received?

THE WITNESS: Unfortunately, it wasn't stamped in, sir.

But I have a note dated July 16, '76, to send that form to Mr. Riley, the controversion, with a copy to Mr. Green, and that did go out on July 19, sir.

JUDGE GERSHUNY: Would that indicate to you the approximate time that you may have received the other?

THE WITNESS: Yes, sir. It would have been somewhere between June 30 and July 19, sir.

JUDGE GERSHUNY: Thank you.

By MR. GREEN:

Q. Mr. Mistretta, what is the next even [sic] in your file?

A. After sending out that notice to Mr. Riley, with a copy to you, on July 22, '76, you wrote to us—to the Bureau, [208] requesting a conference.

Q. An informal conference?

A. Yes, sir.

* * * * * * * * * *

Esther Shafer

JUDGE GERSHUNY: Would you state your full name, please?

THE WITNESS: Esther Shafer.

JUDGE GERSHUNY: How do you spell your last name?

THE WITNESS: S-H-A-F-E-R.

JUDGE GERSHUNY: And where do you reside, and by whom are you employed?

THE WITNESS: My home address is 8809 Woodland Drive, Silver Spring.

JUDGE GERSHUNY: By whom are you employed?

[209] THE WITNESS: Federal Sheet Metal.

DIRECT EXAMINATION

By MR. GALIHER:

Q. Ms. Shafer, can you tell us what your position and duties are with Federal Sheet Metal?

A. I am Secretary to the President, but I also handle payroll, accident reports, and any records that concern any of our employees.

Q. Now, how long have you been with Federal Sheet Metal?

A. Since July of 1975.

Q. And since that time, can you tell us where your office has been located?

A. I have been located at Walter Reed Hospital, we were building the new hospital. I was in a trailer there until last month.

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[224] Q. Now, can you tell us, with respect to Howard Sutherland's records, what it shows for the period of time after November 19, 1975?

JUDGE GERSHUNY: Would it be clearer to have the witness read off the days that he worked, from the 18th on?

MR. GALIHER: Fine, yes, Your Honor.

THE WITNESS: He worked on the 19th, not on the 20th, not on the 21st. The 22n [sic] and 23rd were Saturday and Sunday. He did not work the 24th. He did not work the 25th.

He worked the 26th, not the 28th. The 27th was evidently Thanksgiving. The 29th and 30th were Saturday and Sunday. He did not work the first, did not work the second, did not work the third, did not work the fourth, and did not work the fifth. The sixth and the seventh were Saturday and Sunday. Did not work the eighth, did not work the 9th——

JUDGE GERSHUNY: Is there any reason to go any further?

[225] MR. GALIHER: No, there is not.

JUDGE GERSHUNY: Is it clear then that after the 19th the only day he worked was the 26th?

THE WITNESS: That is right.

JUDGE GERSHUNY: Was it a full day that he worked?

THE WITNESS: Yes, it was eight hours.

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By MR. GREEN:

[227] Did you ever have occasion to have an injury on the Walter Reed job site, where no one reported the injury to you until after you discovered the man was in the hospital?

A. Yes.

Q. Is it fair to say, Ma'am, that this is a regular occurrence?

A. Rarely.

* * * * * * * * * *

[231] A. Entry 98 is Ralph Riley.

Q. What is the notation?

A. "Off rolls, 12-10-75, per Blackie."

Q. Did you make that entry on this record?

A. No.

Q. The date on the entry is 12-10-75?

A. That is when he was taken off the payroll.

Q. Right, "per Blackie." Who is Blackie?

A. He was a superintendent.

Q. Blackie Bransfield?
A. Right.

MR. GALIHER: I thought counsel said is that the date of the injury, and then this witness said, that is the date he went off the payroll. I don't want the record to reflect there is any affirmance by this witness that that is the date of the injury. She was answering a question——

JUDGE GERSHUNY: Let's make it absolutely clear that the written entry reads, "off rolls, 12010-75, [sic] per Blackie." [232] The word injury doesn't show up there at all.

THE WITNESS: This often happens, we carry a man on the payroll for sometime after he is injured.

MR. GREEN: All right.

THE WITNESS: Or for any other reason.

By MR. GREEN:

Q. Would you turn to the week ending December 9, 1975——

JUDGE GERSHUNY: What was the date?

MR. GREEN: December 9, 1975. On my copy of Respondent's H, it is the second page. Entry 74, would you——

THE WITNESS: Ralph Riley.

JUDGE GERSHUNY: I thought you said injury before. It should be entry.

By MR. GREEN:

Q. Could you read that?
A. Ralph Riley. On Wednesday, December 3, hospital; December 4, hospital; December 5, hospital. Then the 6th and 7th are Saturday and Sunday.

Now, the 8th and 9th, there are no hours, but there is no indication of hospital.

Q. What would the indication of hospital mean in that record?

A. I did not make this.

Q. But you are the only person here to explain it to the Court.

[233] A. What I think, we heard he was in the hospital, and we like to know the reason a man is out.

* * * * * * * * * * *

[234] Could you direct your attention, now, to the sheet ending December 2, 1975, entry 91?

A. Right, Howard Sutherland, then there is a notation, "we owe eight hours."

Then on the 26th, he worked eight hours. The 27th was a holiday. The 28th is vacation for him. The 29th and 30th, Saturday and Sunday. The first he worked eight hours. The 2nd [235] he worked eight hours. That brought the total of 32 hours.

Q. When you testified earlier, in response to Mr. Galiher's question, that Mr. Sutherland's last full day at work being the 26th, that testimony was perhaps incorrect upon a review of these records?

A. His last day he was paid was the 26th.

Q. You are indicating he was owed eight hours, he worked the first and second, and so was paid——

A. I am not in a position to really interpret that. I did not enter it.

JUDGE GERSHONY: May I see that a moment? I am somewhat confused.

By MR. GREEN:

Q. Ms. Shafer, let me direct you to the week ending December 2, 1975. There is an indication, "we owe eight hours." Is it fair to say that that indication might be because there was an entry prior that did not reflect eight

hours of work and, upon a check of foreman's records, perhaps, he was owed eight hours?

A. I have no idea why that is there. I don't believe I am in a position to say that.

Q. Go through the rest of that with me. The next day we have a vacation day indicated. Vacation days are paid directly to the Union hall, aren't they, Ma'am, as part of the bargaining agreement?

[236] A. That I do not know. We do not actually pay the men on vacation.

Q. That goes in for hours in the hall?

A. That I don't know.

Q. There is no pay that goes to them for the indication marked vacation?

A. Not from Federal Sheet Metal.

Q. There is no wage earned for that?

A. Right.

Q. Then there are two more indications, December 1 and December 2 of 1975, with an indication, vacation. Those days were not work, is that correct?

A. That is right.

Q. However, at the end of the week there is an entry, 8-8, which indicates the eight hour periods at the end of that week that were owed?

A. Right.

JUDGE GERSHUNY: What does the 8-8 mean at the end of that entry?

THE WITNESS: That is what I am not in a position to say, because I did not enter it.

JUDGE GERSHUNY: Those kinds of entries show up all throughout those payroll records. There are numbers over other numbers. What does that entry mean?

Take one other entry, and just explain to us—I am [237] sorry. There are no other entries like that. I see.

Okay, I am sorry.

By Mr. Green:

Q. Would it surprise you if Mr. Sutherland testified that he worked perhaps four or five days after the 19th—maybe three or four—he isn't sure—and he was paid for those days, would that surprise you, even though your records indicate the 19th being the last day?

A. Yes, it would.

Q. Would it still surprise you he had worked three or four days after the 19th of November, when you take into consideration the entry on line 94 of the week ending December 2, 1975? Does that still surprise you?

The reason I ask that question, if the 8-8 stands for two additional days, and the entry at the front of 91 indicates that they, Federal Sheet Metal, owed this gentleman eight hours, if the entry prior to that indicates you paid him all the time, it would seem to me you gave away money, or your records are incomplete.

A. As I say, I did not make these entries. I do not know.

* * * * * * * * * *

[242]

James A. Bettis

Judge Gershuny: Would you spell your last name, please?

The Witness: B-E-T-T-I-S.

Judge Gershuny: Where do you reside?

The Witness: Springfield, Virginia.

Judge Gershuny: Mr. Green, you may proceed.

DIRECT EXAMINATION

By Mr. Green:

Q. Mr. Bettis, if you don't understand any of my questions because of my cold, or anything else, you let me know, and I will repeat it.

A. Sure.

Q. You have been up all night?

A. Yes.

Q. Was there a time when you were a business agent for the Sheet Metal Local?

A. Yes, sir.

Q. Are you still a business agent?

A. No, I am not.

Q. How long has it been since——

A. 1976.

Q. Mr. Bettis, are you here pursuant to a subpoena?

A. No, I am not.

Q. I would like to ask you a question. Do you have a recollection, sir, in November of 1975, or December of 1975, of receiving a telephone call from Mr. Ralph Riley, or a visit from Mr. Ralph Riley, concerning a work injury, in your capacity as a business agent?

A. I recall a telephone message. He didn't come in and talk to me personally.

Q. Would you tell us your recollection of those events? [244] A. He told me he was injured on the job, and he he needed the name of the insurance carrier——

Q. Let me stop you for a second. Did he call you, or did you call him?

A. He called me.

Q. Had you received an earlier call from a Blackie Bransfield?

A. I talked to him two or three mornings every week during the week. He called to ask about Riley. I said he had called me. At the same time, Blackie asked me when he was coming back to work. I said I didn't have any idea.

Q. Do you recall, Mr. Bettis, what that insurance carrier was, for Federal Sheet, at that time?

A. It was either INA, or CNA.

Q. Do you have any other recollection of getting back to Mr. Riley with information concerning the insurance company?

A. No.

Q. Do you have any recollection of Mr. Bransfield, or anyone at that trailer, calling you again concerning Mr. Ralph Riley?

A. No.

Q. That is your entire recollection of these events?

A. One time, I talked to Blackie Bransfield about Riley.

Q. What time—do you have any recollection—that you talked to him?

[245] A. I couldn't tell you the exact date. It had to be either the latter part of November, or first part of December.

Q. Why do you feel that way?

A. To me, it was right around Thanksgiving time. We did not record any telephone calls.

Q. Let me go into that for a second. As a business agent at that time, did you make a practice of reporting work injuries?

A. No.

Q. Was this an exceptional kind of thing, when you reported it to Blackie Bransfield?

A. No. He just asked me when he was coming back to work. I had no idea.

MR. GREEN: Nothing further.

CROSS EXAMINATION

By Mr. Galiher:

Q. Mr. Bettis, what kind of work do you do now?
A. Sheet metal work.

Q. How old are you?
A. Fifty-seven.

Q. You are still a member of the Union local that Mr. Riley is a member of?
A. Yes, I am.

Q. I don't think the record is real clear here. Let me ask it to you like this, first thing that happened, you received a call from Riley. You did not receive a call from Bransfield.

[246] Right.

Q. When you received a call from Riley, he said he was injured on the job, and did he say how he was injured on the job?
A. No. He told me he was injured on the job, and wanted the name of the insurance carrier.

Q. Did he tell you he was in the hospital at that time?
A. No, he did not.

Q. Did he tell you what part of his body was injured on the job?
A. No, sir.

Q. And then your practice was that you talked to Blackie Bransfield about two or three times a week at that time. About what, sir?
A. He would call me for people to come to work.

Q. Now, was it then, during one of these phone calls from Mr. Bransfield, which occurred after Mr. Riley had called you, that you told Mr. Bransfield that you had received a call from Riley, and that Mr. Riley had been in-

jured, and needed the name of an insurance company, is that right?

A. That's right.

Q. And did you advise him at that time that Mr. Riley had said he had been injured on the job?

A. Yes, I told him that on the telephone at the time.

MR. GALIHER: Thank you. I don't have any other questions.

[247] JUDGE GERSHUNY: Mr. Bettis, you are excused. Thank you for coming in.

THE WITNESS: Thank you.

(Witness excused.)

MR. GREEN: Your Honor, the Claimant calls James Killeen.

Whereupon,

James Killeen

was called for examination and, having been first duly sworn, was examined and testified as follows:

JUDGE GERSHUNY: Would you spell your last name, please?

THE WITNESS: K-I-L-L-E-E-N.

JUDGE GERSHUNY: Where do you reside?

THE WITNESS: Prince George's County, Maryland.

JUDGE GERSHUNY: Mr. Green, you may proceed.

DIRECT EXAMINATION

By MR. GREEN:

Q. Mr. Killeen, what is your present occupation?

A. Business agent for Sheet Metal Workers.

Q. How long have you held that position?
A. January 18, 1975.

Q. Mr. Killeen, are you here pursuant to a subpoena?
A. No.

Q. Do you have a recollection, sir, of an injury to [248] Ralph Riley, or any events surrounding Ralph Riley and his work in late November or December, '75?
A. I had heard that Ralph was hurt at that time, yes.

Q. Do you have a recollection, sir, of a telephone call from Mr. Riley to Mr. Bettis?
A. Specifically, no.

Q. All right, sir.

Do you have a recollection of any event surrounding Mr. Riley reporting an injury to you?
A. Correct. Whatever agent is in the hall, I would try to answer to. Ralph got me. Whether specifically it was Bettis or me, what have you, we just try to serve the membership.

Q. Do you have a recollection, Mr. Killeen, of when that might have been?
A. In December, roughly the middle of December.

Q. 1975?
A. Correct.

Q. Do you have a specific reason why you recall this conversation?
A. That morning I had been talking to a buddy of his——

Q. Whose?
A. Ralph's. Then I got a call from Ralph, and I had only met Ralph on two occasions. You try to get to know your membership. I had heard certain things about him. I told Ralph I would help him any way I could.

[249] Q. What was the request?
A. Would I call out to Federal Sheet Metal and inform them he had been hurt on the job.

Q. Was he asking for any specific information from Federal Sheet?

A. He asked me if I would find out the insurance carrier.

Q. All right, sir.

Do you have recollection of making such a call?

A. I do.

Q. On his behalf?

A. I do.

Q. Who would you have called?

A. Blackie Bransfield. I knew Blackie well, because I worked right there in the trailer.

Q. Had you been on that job site, sir, prior to this injury?

A. I had been, prior to my election.

Q. As a matter of fact, you know Blackie Bransfield rather well?

A. Know of him, and then worked for him, right under him, eight months.

Q. You placed a call to Mr. Bransfield. Do you remember what information you gave him?

A. That Ralph had called me to tell them that he was hurt on the job. That was the message, to give him the insurance [250] carrier.

I have it on the back of the sheet as Insurance Company of North America. It is on the back of our out-of-town list jobsheet.

Q. Do you have a recollection of talking to Mr. Riley to give him the name of the insurance company?

A. Yes, I would call him back.

Q. Do you have a recollection of doing that?

A. Yes.

• • • • • • • • • • •

Whereupon,

John Fury

was called as a witness and, having been first duly sworn, was examined and testified as follows:

JUDGE GERSHUNY: Would you state your name, and your home address, Mr. Fury?

THE WITNESS: John R. Fury, 529 Nolwood Court.

DIRECT EXAMINATION

By MR. GALIHER:

Q. How long did you work for Federal Sheet Metal at [252] Walter Reed Hospital?

A. Approximately four years.

Q. You are a sheet metal worker?

A. Foreman.

Q. You were foreman on this particular job?

A. Yes.

Q. Did you ever have occasion, in November of '75, to have Mr. Howard Sutherland or Ralph Riley on your crew?

A. Yes.

Q. Can you tell us how long they were on your crew, and what floor your crew was working on at that time?

A. Well, telling you how long is kind of hard. I guess a couple of months. We were on the second floor, first and second floor.

Q. Did there ever come a time when Mr. Riley and Mr. Sutherland were transferred to work either on the fifth or sixth floor for other foremen, or that you went up there with them?

A. They were transferred to the fifth or sixth floor.

Q. Can you tell me who they were transferred to?

A. I think it was Jack Barron.

Q. Can you tell me, when you talk about transfer, how it works on the job, as far as these men were formally a member of your crew, and then transferred to Mr. Barron, what kind of an operation does that take to accomplish this?

A. The superintendent tells me he wants the men to go [253] upstairs.

Q. Were you assigned different floor areas in that building?

A. Yes, I was.

Q. You were on the second floor?

A. No, I was all over the job.

Q. Was the foreman Mr. Phares?

A. Yes.

Q. Did there come a time, you can recall, where Mr. Sutherland and Mr. Riley were transferred?

A. Yeah, they were.

Q. Can you tell me thereafter how it worked, as far as, once they were transferred, if somebody was injured, what instructions did the company give to people about reporting injuries? How was that to be handled?

A. Well, if a man in your crew was injured, you were supposed to have an accident report filled out.

Q. That man was supposed to report the injury to his foreman, whoever his foreman was at the time?

A. Well, you know, yeah.

Q. Now, did there come a time when you became aware that Mr. Riley was in the hospital?

A. Yeah, he was sent upstairs, and I don't know how long, maybe three or four days later, Howard Sutherland came back to the job. I believe he came back to pick up his tools, or pick [254] Ralph Riley's tools. A bunch of the guys used to meet down on the second floor. He told all the men there that Ralph was hurt—got hurt, and that he also had a heart attack, and was in intensive care.

MR. GALIHER: Thank you, Mr. Fury. I don't have any other questions.

JUDGE GERSHUNY: Mr. Green?

CROSS EXAMINATION

By MR. GREEN:

Q. Mr. Fury, did Mr. Sutherland say that Mr. Riley was hurt on the job, or just hurt, do you recall?

A. I am more than sure he said he was hurt on the job, yes, sir.

Q. You had been his foreman earlier, is that right?

A. Yes, sir.

Q. Now, Mr. Sutherland told you he was hurt on the job?

A. Yes.

Q. Why didn't you make an injury report at that time?

A. He wasn't working for me. It wasn't my job.

* * * * * * * * * * *

[255] Q. When Mr. Fury said he was hurt on the job, did —pardon me.

Well, when Mr. Sutherland said that to you, did he indicate what part of his body was hurt, or what he was doing when he got hurt?

A. No.

* * * * * * * * * * *

[256] JUDGE GERSHUNY: Is there any issue in this case as to the inadequacy of the notice, because I didn't understand that it was at issue?

Foreman Fury has just stated that he was told by Mr. Sutherland that the Claimant was injured on the job.

Now, are you going to, now, contend that that is an insufficient notice?

MR. GALIHER: As far as the notice issue, no. As far as existence and happening of an accident, yes.

JUDGE GERSHUNY: Why don't you explain that a little more to me for the record at this point? I don't understand that fine line you are trying to draw.

MR. GALIHER: There are two things you have to have. You have to have an accident, and you have to have an injury, and then you have to have notice. For the first time, with Mr. Fury's testimony, we now know there was some claim that Mr. Riley was hurt on the job. We don't know the specifics of it.

We are going to have to wait for the doctors on that. We still have a question as to whether the injury happened in the way described by Mr. Riley as far as the accident, because of the hospital records, and because of the doctors' records, which are in evidence in the case.

• • • • • • • • • • •

[258]

Howard Sutherland (continued)

MR. GREEN: That document, for identification, is a [259] pay stub issued to H. Sutherland, Social Security Number 230-34-7513, from the New York office of Federal Sheet Metal, 7th Street, Jamaica, New York, Division of United States Industries, indicated as having been issued for the period ending 12-2-75.

JUDGE GERSHUNY: What does it show?

MR. GREEN: It shows that Mr. Sutherland received, for the work ending 12-2-75, pay in the gross amount of $159.36 from Federal Sheet Metal at the hourly rate of $9.96. It also shows his gross earnings for that year with Federal Sheet Metal, $1,533.84.

• • • • • • • • • • •

CLAIMANT'S EXHIBIT 2

Office of the Deputy Commissioner
U.S. Department of Labor
Office of Workers' Compensation Programs
1717 K Street, N.W.
Washington, D.C. 20211

Claimant: Ralph E. Riley
Employer: Federal Sheet Metal Inc.
Accident Date: 11-19-75

Gentlemen:

This is to notify you that I am hereby making claim for workmen's compensation benefits and am filing this claim with you in accordance with Sections 13 and 19 of the Longshoremen's and Harbor Workers' Compensation Act, as extended, by the District of Columbia Workmen's Compensation Act.

I was injured while I was working at Walter Reed Hospital.

The accident occurred when I was lifting duct work weighing approximately 500 pounds and felt sharp pain in neck.

I sustained the following injuries: cervical neck.

Please be advised that I have retained Ashcraft, Gerel & Koontz to represent me in this claim, and it is understood that any attorney's fee will be approved by the Office of Workers' Compensation Programs.

Very truly yours,

/s/ Ralph E. Riley
Claimant
Attorney handling case:
xxx James F. Green

Ashcraft, Gerel & Koonz
Attorneys at Law
925 - 15th Street, N.W.
Washington, D.C. 20005
Telephone: 783-6400

CLAIMANT'S EXHIBIT 3

December 29, 1975

Mr. George F. Mistretta
Office of Workmen's
Compensation Programs
1717 K Street, N.W.
Washington, D. C.

Re: *Ralph E. Riley* v.
Federal Sheet Metal Inc.
D/A 11-19-75

Dear Mr. Mistretta:

Please find enclosed herewith an original and two copies of our claim form to be filed on behalf of our client, Ralph E. Riley.

Very truly yours,

James F. Green

JFG/alw

Enclosure

cc: INA Insurance Company
5225 Wisconsin Avenue
Washington, D. C.

RESPONDENTS' EXHIBIT A

GUILLERMO E. SANCHEZ, M.D.

26 January 1976

Insurance Company of North America
5225 Wisconsin Avenue, N.W.
Washington, D.C. 20015

Attention: M's Ann E. Hunter

Re: *Ralph Riley*

Dear Madam:

The following is a preliminary report of orthopedic examination and treatment on Ralph Riley who was initially seen in Orthopedic Consultation at the Physicians Memorial Hospital in La Plata, Maryland, on the 23rd of November, 1975, at the request of his attending physician, Dr. Henry Burke, who had admitted this patent to the Intensive Care Unit for treatment of a heart condition.

ORTHOPEDIC HISTORY:

Ralph Riley is a 51 year old male who states that since the year 1970 that he has been consistantly [sic] troubled with pain at the base of the neck, both shoulders and both arms. At that time the problem was disagnosed as cervical osteoarthritis, by his attending physicians and he had different trials of conservative therapy. The therapy consisted of ultrasound, hydrotherapy and cervical traction, which at times had resulted in severe headaches forcing him to discontinue the therapy. He states he also had muscle relaxents [sic] off and on, with only partial relief from his symptoms.

In the year 1969, he states he had an injury when he fell back against a masonry wall, but at that time he remembers injuring mainly the left shoulder. There was also another injury while in the active military service, with the Marines, when he fell from a horse and was dragged for approximately ¼ miles.

This patients complaints since 1970 have been characterized by exacerbations and remissions, that have been treated with different medications including Indocin. Most of his work is overhead and with the neck on hyperextension.

In November, 1975, this patient was doing stock work at the Walter Reed Army Medical Center, hauling the duct work into position, when he felt pain at the base of the neck.

He states at this time, he felt pain at the base of the neck. He was already taking medications. He states he took some of his medications and this gave him relief temporarily. However, the following day he developed acute chest pain and was admitted to the Intensive Care Unit in the Physicians Memorial Hospital in La Plata, Maryland. He states with all of the xcitement [sic] at the time of admission, he forgot to mention to the attending physicians, this incident that happened at work.

During this consultation, the main problems were of constant pain at the base of the neck, radiating down both arms to the tip of the fingers, which is markedly increased by coughing and sneezing. Tingling and numbness sensations, particularly on the ulnar side of the left hand has become more progressive.

PHYSICAL EXAM:

Initial examination revealed an individual that held his neck slightly tilted forward. The range of motion revealed that flexion could be accomplished at two finger breaths from the sterno-notch to the chin. Extension was bearly [sic] to neutral. Rotation was 50 degrees on each side. Lateral bending was slightly limited. There was tenderness to deep digital pressure from C4 to C7.

Abduction of the left shoulder was limited. The reflexes appeared equal. The power of grip was markedly decreased.

Sensation did not show findings suggestive of a dermatone [sic] involvement.

RADIOLOGY:

Xrays of the cervical spine revealed osteoarthritic changes with narrowing of the disc space, particularly at C6 and C7 levels.

DIAGNOSIS:

Osteoarthritis of the cervical spine, with radiculopathy of C6, C7

HOSPITAL COURSE, TREATMENT AND PROGRESS:

While in the hospital, cervical traction was applied, which the patient was unable to tolerate, stating this aggravated the pain and in addition precipitated the onset of headaches. This was discontinued. He was still receiving analgesics and muscle relaxents [sic] which again were of very little value. A cervical collar did not appear to relieve the symptoms. The patient was discharged by Dr. Burke, with instructions for followup care.

On the 19th of December, 1975, Mr. Riley was re-examined in this office. At this time, he reported absolutely no improvement from his symptoms. He stated that the pain was even more severe and still radiating to both upper extremities, but more towards the left side. At this time it was decided to have him follow a supervised regime of physical therapy and he has been receiving treatment in this office in the form of hot packs, ultrasound and cervical traction, which has helped in relief from his symptoms to some extent.

The patient was last seen in this office on the 23rd of January, 1976.

At this time, the range of motion of the neck had improved. There is still significant pain present, but to a lesser extent.

Mr. Riley is to return to this office in three weeks, for re-evaluation.

Sincerely yours,

Guillermo E. Sanchez, M.D.

GES:mb
Encl.

cc: Henry Burke, M.D.
La Plata, Maryland 20646

RESPONDENTS' EXHIBIT B

87

SA 248

INA

INSURANCE COMPANY OF NORTH AMERICA

WORKMAN'S CLAIM FOR COMPENSATION

PLEASE COMPLETE

REQUIREMENTS: Claimant must cooperate in furnishing full information. This claim form should be fully completed and promptly filed by injured person.

WRITE CAREFULLY, USE PEN OR INDELIBLE PENCIL. MAIL DIRECT TO

CLAIM

I hereby make claim upon my employer Federal Sheet Metal and the INSURANCE COMPANY OF NORTH AMERICA for compensation provided by law, and base my claims on the following facts, which I certify are true:

THE INJURED PERSON

How long have you worked for the above employer? 137 hours

Occupation when injured Sheet Metal WKR Were you doing your regular work? YES

Give date of your birth 1-1-24 If under 21, give name and address of Parent or Guardian

THE INJURY AND THE CAUSE

Place where injury was sustained, street and No. Walter Reed Hospital

City or town Washington, D. C. If away from employer's premises or plant, state where

Date on which injury was sustained 11-19-75 Hour of day 3:45 P.M.

Date forced to leave work on account of injury hospitalized Hour of day 11-20-76 A.M. 6.

Salary (or wages) when injured, $ 9.96 per hour Date salary (or wages) was stopped as a result of your injury 11-19-75

On whose payroll were you? Federal Sheet Metal

Describe fully nature and extent of injury and how same was sustained Lifting sheet metal duct work with shoulders into trapeze hangers striking neck and shoulders on duct work aggravating existing cervical arthritis

When did you first report your injury? 11-24-76 To whom? Floor foreman

Was injury caused by another person? NO Name

Address If so, give particulars on reverse side.

Have you claimed or received settlement for this injury? NO from whom

Name and address of two eye witnesses: WORKING PARTNER

Name Howard Sutherland Address 5901 Fista Road, Oxon Hill, Md

Name Address

MEDICAL ATTENDANCE

~~(La Plata, Md 20646 (Box 591) Henry L. Burke, M.D.)~~

Name of attending physician or surgeon Guillermo Sanchez, M.D. Physicians Memorial Hosp.

Doctor's address Box 387 City or town La Plata, Md. 2064

To what hospital sent? Physicians Memorial, La Plata, Md.

If not sent to hospital, where?

RESULT

Have you returned to work? No If so, give date of return

If not, can you state when you will be able to return Retired March 1, 1976

Are you still under the doctor's care YES Present Wages, $ Per

Signed this 16th day of July 1976

Workman making claim sign full name here Ralph E. Riley

Are you related to the employer NO If so, what?

Give address to which mail should be sent Rt. 1 Box 46A, Indian Head, Md. 20640

Witness to signature sign here Margaret M. Riley

Are you living in the employer's household or premises

Address of witness

NOTE: If you were injured in a street accident make diagram on reverse side and explain fully who was at fault and why.

Resp. # B
Riley

CL-153a Printed in U.S.A.

RESPONDENTS' EXHIBIT C LA PLATA MARYLAND

1-3 7-7	PATIENT'S LAST NAME: Riley	FIRST NAME: Ralph	E.	MAIDEN NAME		HOSP. RECORD NO.: 10033							
PATIENT'S ADDRESS: Route 1, Box 46A	CITY: Indian Head	STATE: Md.	ZIP: 20640	COUNTY: Charles	HOME PHONE NO.: 301-743-5077	LAST ADMISSION DATE	☐ INPAT. ☐ OUTPAT.						
14-18 ADMISSION TIME: 08:30 A M		19-24 ADMISSION DATE: 11-20-75	25-26 ROOM: 2101	BED 29-30: 99	31 PATIENT'S TYPE: 1	DATE AND TIME OF DISCHARGE: 11/25/75 11 AM							
36-42 DATE OF BIRTH: 01-01-24	AGE: 51	PLACE OF BIRTH: Pa	32-34 RELIGION: Cath.	35 RACE: 02	SEX:	MARITAL STATUS: Married	CODE: 01	43 PIC: A	44 # PLANS: 1				
45-49 ADMITTING DOCTOR: Burks	DOCTOR NO.: 01004	SERVICE: MSC		REFERRED BY		STATE	MILITARY SERVICE	YRS. & BRANCH					
SPOUSE'S NAME AND ADDRESS: Margaret M. Riley								TELEPHONE NO.					
NEXT OF KIN: Same	ADDRESS					RELATIONSHIP	TELEPHONE NO.						
PERSON TO NOTIFY IN CASE OF EMERGENCY: Same	ADDRESS					RELATIONSHIP	TELEPHONE NO.						

ADMITTING DIAGNOSIS: (ICDA CODE)
R/O Myocardial infarction

NO. HOSP. DAYS	DATE BABY BORN	SEX	DATE BABY DISCHARGED	
5				V D

FINAL DIAGNOSIS

Cervical osteoarthritis
Sliding hiatal hernia
Anxiety

CODE NUMBER

715.1

S S ?

COMPLICATIONS

OPERATION

Resp. # C
Riley

RESULT: RECOVERED ☐ IMPROVED ☐ UNIMPROVED ☐ NOT TREATED ☐ DIED ☐ RELEASED AGAINST ADVICE ☐

2 8 75
DATE

6

Richard Burks M.D.
SIGNATURE ATTENDING PHYSICIAN

354007

11 PATIENT'S NAME (LAST, FIRST, MIDDLE): Kiley, Kachis E
ADMISSION DATE: 11-20-75
PATIENT TYPE (1-3):
SOCIAL SECURITY NO: 145-22-2[illegible]
RELIGION: Cath
RACE: 8
PATIENT'S ADDRESS (STREET, CITY, STATE, ZIP): Rt 1 Box 46A Indian Head
PRV CLASS (1-3):
ADMITTING DOCTOR NO: 001-19
SERVICE: M/S
TIME: 6:20 AM PM
PHONE: 743-5077
DATE OF BIRTH: 1-1-24
AGE: 51
SEX: M F
MARITAL STATUS: S M W DIV SEP
PATIENT'S EMPLOYER: Sheet Metal Local 102
13 PERSON RESPONSIBLE FOR BILL: Ralph E Kiley
ADDRESS: Same
TELEPHONE NO:
RELATIONSHIP: self
EMPLOYER OF RESPONSIBLE PERSON: Sheet Metal Local 102
EMPLOYER'S ADDRESS: Work D.C.
TELEPHONE NO:
NAME AND ADDRESS OF INSURANCE CO: Local 102
NAME OF INSURED OR SUBSCRIBER:
IDENTIFICATION NO:
GROUP NO:
CODE:
EMPLOYER OF SUBSCRIBER:
RELATIONSHIP: SELF SPOUSE FATHER MOTHER OTHER
DATE OF INJURY OR ONSET OF ILLNESS: 11-20-75 @ 3AM
BROUGHT IN BY: Wife
REMARKS:
MEDICARE NO:
PART A COVERAGE:
PART B COVERAGE:
MEDICAID NO / STATE AGY:
DATE OF ISSUE:
EXPIRATION DATE:
CITY / COUNTY / STATE:
PRIVATE REFERRAL PHYSICIAN: Dr. H Blustein / Burke DC
NOTIFIED? YES NO
15
POLICY / CONTRACT OR SUBSC NO:
GROUP NO:
ESTIMATE KEY:

CHARGES

EMERGENCY ROOM		MEDICAL SURGICAL SUPPLIES - CAST		OPERATING ROOM MINOR SURGERY		ANESTHESIA SUPPLIES	
X-RAY		PHARMACY		RECOVERY ROOM		EKG	25.00
LABORATORY		OXYGEN		ANESTHESIA FEE		TOTAL CHARGES	
IV						AMOUNT PAID	
						BALANCE DUE	

NATURE OF COMPLAINT: Both arms tight - chest - orbit pain (6:25) BP 132/90 P 88 T
WHEN, WHERE, HOW: (6:25) Woke up at 3AM with feeling of tightness in arms chest and blurry vision. Unable to walk. Had similar episode 2 years ago. Keeps stating that cholesterol level needs checking. Meds → Indocin for arthritis
PHYSICAL FINDINGS: No SOB, nausea
P.E. Pt alert, oriented x 3
HEENT - normal
Neck - supple, nontender - Carotids full
Chest - Clear - Back - no CVA tenderness
Heart - RR+S1 S2, no gallop
Abd - soft, nontender, no organomegaly
Ext - normal - Pare PVE
TREATMENT: 6:30 CBC - 90, SGOT, SGDH
Demerol 100 - Refused
DIAGNOSIS: R/O MI

☐ POLICE ☐ CORONER
☐ REFERRED TO DR. Burke DC
Helen Kelsey RN
NURSE'S SIGNATURE R.N.

A.M. P.M. BY:
☐ HOME ☐ HOSPITAL ☐ OTHER
DATE P.M.
Jim Finnerty
PHYSICIAN'S SIGNATURE M.D.

FOLLOW-UP INSTRUCTIONS TO PATIENT:

I hereby acknowledge treatment and/or consultation as specified above. I do hereby give my consent for treatment as ordered by the attending physician in this hospital. I also understand follow-up instructions given to me.

NAME (SIGNATURE) ADDRESS 40033 TEL. NO.

WITNESS

MH 000-300-316

Best Copy Available

HISTORY

HOSPITAL REGULATION:

All Positive and Important Negative Findings Shall Be Recorded.

Date 11/20/75 Hour 7:30 a.m.

ORDER OF RECORDING:

1. Chief Complaint 2. History of Present Illness 3. History of Past Illness a) childhood b) adult c) operations d) injuries 4. Family History 5. Social History 6. Systemic Review a) General b) Skin c) Head-Eyes-Ears-Nose-Throat d) Neck e) Respiratory f) Cardiovascular g) Gastrointestinal h) Genitourinary i) Gynecological j) Locomotor k) Neuropsychiatric 7. Signature

---

This is a 51 year old male, who woke about 3 a.m. with a feeling of tightness across the chest like a rope. The pain and tightness in the [sic] both arms and blurred vision. He felt a little sweaty but no nausea and vomiting. He got up and his walking felt a little unsteady. He had sweating of his feet and hands and he felt like his equilibrium was off. He has had a similar episode about one year ago which time he was told of high blood pressure and high cholesterol. Since that time he lost 11 pounds. He has been on no medications for his blood pressure, he works on high places a [sic] a steel worker and intermittently has sharp shooting chest pains and pains in the back of his neck and shoulders which has been attributed to arthritis for which he has taken phsical [sic] therapy. The patient has two brothers, one of whom died of a heart attack at 59 and the other 63 who has problems with recurrent heart attacks. The patient is very anxious and tense. He has no pain at the present time. There is no history of diabetes. There is no history of syncope, no history of Rheumatic Fever, Scarlet Fever or heart murmur. There is no history of pedal edema, PND, orthopnea.

Past history, family history: Father died at 72, had diabetes. Mother 66 had heart disease. Four sisters, two have high blood pressure. One brother has diffuse arthritis. Childhood illnesses: Mumps. Operations: Surgery on the left leg from a war wound. Injuries: Fracture right shoulder. Fractured right arm. Allergies: Penicillin. Medication: Indocin for arthritis. Appetite good. Weight 175 to 180. No cigarettes, no alcohol, no coffee. The patient lives with his wife.

Head—The patient has intermittent headaches in the occipital area, occasional blurred vision and intermittent fuzziness of vision. He has had no syncope. Eyes—He has some dyplopia on occasion which quickly straightens out to a single image, no pain, redness. Ears—No decreased hearing, pain, discharge or bleeding. Nose—No epistaxis. Throat—No hoarseness, no difficulty in swallowing, no loss of voice. Respiratory—No history of contact with TB, he had pleurisy times one and pneumonia, No cough, no sputum production, no wheezing, no shortness of breath. GI—He has intermittent heartburn and indigestion. He avoids fatty foods, he takes Digel tablets. He has no melena, hematemesis, or hematochezia. He had no recent nausea and vomiting. He has had no upper GI or gallbladder study. GU—No dysuria, urgency, frequency, or hematuria. He fell and broke two of the lower right ribs about a year or two ago. No internal injuries. Musculoskeletal—He has arthritic complaints on the neck. Endocrine—There is no history or symptoms of diabetes, no history of symptoms of thyroid disease such as palpitations, edema or weather intolerance. There is no history of anemia or bleeding tendancy [sic]. He has had dental and no allergies to Novocain.

/s/ Henry L. Burke, M.D.

Name—Riley, Ralph E. Hospital No. 40033
Location in Hospital—ICU HLB/sm
Clinic or Service—t: 11/21/75
Attending Physician—Henry L. Burke, M.D.

PHYSICAL EXAMINATION

HOSPITAL REGULATION:

All Positive and Important Negative Findings Shall Be Recorded

Date 11/20/75 Hour 7:30 a.m.

ORDER OF RECORDING:

1. General 2. Skin 3. Eyes 4. Ears 5. Nose 6. Mouth 7. Throat 8. Neck 9. Chest 10. Heart 11. Abdomen 12. Genitalia 13. Lymphatic 14. Blood Vessels 15. Locomotor 16. Extremities 17. Neurological 18. Rectal 19. Vaginal 20. Diagnosis 21. Signature

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On physical examination he is alert and oriented. The patient is appearing extremely anxious. Blood pressure in the right arm is 140/92, left arm 136/92. Pulse 72 and regular. Respirations 14. Head—Normocephalic, scalp clear. Neck—Decreased range of rotation to the right and left with tenderness in the cervical spine. JVP not elevated at 30 degrees. Thyroid not palpable, no masses, no bruits. Eyes—Pupils equal and reactive to light and accommodation. Extra ocular movements normal, conjunctiva not pale, sclera white, fundi Grade I, Ears—Tympanic membranes clear. Nose—Mucous membranes red and wet. Throat—Tongue well papilated, gag reflex positive, uvula midline, pharynx clear. Lungs—Clear to percussion and auscultation, heart PMI not felt, S1 normal, A2 greater than P2, no murmur, no gallop and no rub. Abdomen—soft, bowel sounds active, liver spleen and kidneys not felt, no masses and no bruits. Pulses—Carotid, brachial, radial, femoral, popliteal, posterior tibial and dorsalis pedis 2+, no edema. Neurologic—Alert and oriented, cranial nerves 2-12 intact. DTR 2+ throughout, Babinski negative. Sensory intact.

Motor intact. Testes descended bilaterally. Small left inguinal hernia, circumcised.

ADMISSION DIAGNOSIS: Chest pain, rule out myocardial infarction. Hypertension by history, anxiety. Cervical arthritis by history.

/s/ HENRY L. BURKE, M.D.

HLB:sm
t: 11/21/75

Name—Riley, Ralph E. Hospital No. 40033

Location in Hospital—ICU

FINAL SUMMARY SHEET

NAME: RILEY, Ralph E.

HOSPITAL NO. 40033

ADMISSION DATE: 11/20/75

DISCHARGE DATE: 11/25/75

ATTENDING PHYSICIAN: Dr. Burke

This is a 51 year old male, who awakened at 3 a.m. with a feeling of tightness across his chest like a rope. The pain and tightness radiated to both arms and he felt some blurred vision. He had some sweatiness, no nausea or vomiting. He got up and felt a bit unsteady. He had a coldness and sweating of his hands and feet and felt like his "equilibrium was off". He had a similar episode about a year ago and was told of high blood pressure and high cholesterol. Since that time he has lost 11 pounds, he has been on no medication for his blood pressure. He complains of intermittent sharp shooting pains in the chest and back especially the neck and shoulders, which has been attributed to cervical arthritis. He has seen an orthopedic surgeon for this, and has taken physical therapy. He has two brothers, one of whom died of a heart attack at age 59 and another brother age 63, who is currently in the hospital with a heart attack. The patient is extremely anxious and tense. Past history: Father died at the age of 72, he had diabetes. Mother age 66 had heart disease. Medication is Indocin for arthritis. Rest of the past history and review of systems can be seen on the admission history and physical.

On physical examination: His blood pressure 140/92 in the right arm, 136/92 in the left arm. Pulse 72. Neck—JVP was not elevated at 30 degrees. Lungs clear. Heart—PMI not felt, S1 normal, A2 greater than P2, no murmur, no gallop and no rub. Abdomen—Soft, bowel sounds active.

Liver, spleen and kidneys not felt, no masses and no bruits. Neurologic intact.

Hospital course: The patient was admitted to the Coronary Care Unit to rule out the possibility of a myocardial infarction. He had some pain in the left upper anterior thorax at the second and third rib insertions, there was some tenderness at that time. As he was at bedrest for two days, he began having sharp pains in the shoulders which did radiate to the upper arms. By 11/24/75, the ache and pain did seem to originate from the cervical spine, across the shoulders and down both arms. At the time of discharge. it was felt that his pain had been due to cervical arthritis and he was referred back to his private physician, Dr. Witosky. [sic] There was no evidence of any myocardial damage. He was discharged on Valium 5 mg t.i.d. and Buffered Aspirin as needed for his arthritis. Constant monitoring in the Coronary Care Unit revealed no arrhythmia. Consultation was obtained from the orthopedic surgeon, Dr. Sanchez, for evaluation of his neck pain. His impression was osteoarthritis of the cervical spine, possible radiculopathy of C6, C7. He recommended intermittent cervical traction, Valium and Bufferin, hot packs and if no relief, possible cervical nerve blockage. The patient could not tolerate the cervical traction and he perferred [sic] to return to Dr. Pavot, an orthopedic surgeon who he had seen previously.

Laboratory work: His admission Hematocrit 44, Hemoglobin 15.1, white count 4,200, 56 Segs, 1 Eos, 1 Baso, 37 LYmphs and 5 Monos. RPR non reactive. Urinalysis—Straw, 1016, pH 7, few Epitheal cells. SMA-12 revealed the following tests to be normal: Total Protein, Albumin, Calcium, [sic] Phosphorus, Cholesteral was 245, Fasting Blood Sugar was 105, BUN, Uric Acid, Creatinine, Bilirubin and Alkaline Phosphatase were all normal. Admission electrolytes—Sodium 144, Potassium 4.3, Chloride 111, CO 2 23. SErial enzymes on 11/20/75, LDH 56, SGOT 14, CPK 40.

11/21/75, LDH 43, SGOT 14, CPK 15. On 11/22/75, LDH 33, SGOT 14, CPK 6. On 11/23/75, LDH 44, SGOT 11, CPK 9. Serial EKG's beginning on 11/20/75 were all within normal limits, with no evidence of any serial change. X-rays, chest x-ray revealed no active disease. The heart was not enlarged. Examination of the cervical spine revealed narrowing of the intervertebral disc spaces at C5, C6 and C6-C7. Small degenerative spurs of the vertebral bodies was C5, C6 and C7 were noted. There is some encroachment on the neural foramina of C5-C6 bilaterally by the posterior spurs. Examination of the upper gastrointestinal tract revealed a small sliding hiatal hernia, no definite gastroesophageal reflux. Stomach was unremarkable. The duodenal loop and cap was normal.

Dicharge Diagnosis: 1. Cervical osteoarthritis. 2. Sliding hiatal hernia. 3. Anxiety.

The patient is returning to his private physician, Dr. Witosky [sic], for followup.

/s/ Henry L. Burke
Henry L. Burke, M.D.

HLB/sm
t: 12/8/75
cc: Dr. Witosky [sic]

RESPONDENTS' EXHIBIT D

SA 295 101

PATIENT'S ADDRESS: Rt.1 Box 46-A | CITY: Indian Head, MD 20640 | STATE | ZIP | COUNTY: Charles | HOME PHONE NO.: 301-743-5077 | LAST ADMISSION DATE | INPAT. OUTPAT.

ADMISSION TIME: 08:40 P M | ADMISSION DATE: 03-31-77 | DATE AND TIME OF DISCHARGE: 4/9/77 11:00 AM PM

DATE OF BIRTH: 01-01-24 | AGE: 53 | PLACE OF BIRTH | RELIGION: Pro | RACE: 02 | SEX: M | MARITAL STATUS: Married | CODE: 01 | P/C: A | PLANS: 1

ADMITTING DOCTOR: Szacher | DOCTOR NO.: 01122 | SERVICE: M/S | REFERRED BY | STATE | MILITARY SERVICE YRS & BRANCH

SPOUSE'S NAME AND ADDRESS: Margaret Riley same | TELEPHONE NO.

NEXT OF KIN: same ADDRESS | RELATIONSHIP | TELEPHONE NO.

PERSON TO NOTIFY IN CASE OF EMERGENCY: same ADDRESS | RELATIONSHIP | TELEPHONE NO.

ADMITTING DIAGNOSIS: (ICDA CODE) Acute lumbar strain

NO. OF DAYS: -OSP. | DATE BABY BORN | SEX | DATE BABY DISCHARGED

FINAL DIAGNOSIS | CODE NUMBER

Acute Lumbosacral Strain 8'

Cervical Spondylosis 5013

Hiatal Hernia

COMPLICATIONS

SAME

OPERATION

TRACTION 81.6

Resp. # D Riley

RESULT: RECOVERED ☐ IMPROVED ☑ UNIMPROVED ☐ NOT TREATED ☐ DIED ☐ RELEASED AGAINST ADVICE ☐

4-9-77 DATE

SIGNATURE ATTENDING PHYSICIAN M.D.

Best Copy Available

PHYSICIAN'S MEMORIAL HOSPITAL
La Plata, Maryland

RADIOLOGY—Whei-rung Fu, M.D.

M105
11/24/75

RILEY, RALPH E. Ind. Head, Md. 51WM Dr. Burke
UGI/C—spine/chest 2N4

Examination of the chest fails to demonstrate any active disease. The heart is not enlarged. The examination is otherwise unremarkable.

Examination of the cervical spine fails to demonstrate any evidence of fracture or dislocation. There is some narrowing of the intervertebral disc spaces of C-5 C-6 and C-6 C-7. Small degenerative spurs of the vertebral bodies of C-5 C-6 and C-7 are noted. There is some encroachment of neural vertebral foramen of C-5 C-6 bilaterally by the posterior spurs. The examination is otherwise unremarkable.

Preliminary film of the abdomen fails to demonstrate any significant abnormality.

Examination of the upper gastrointestinal tract demonstrates a small sliding type hiatal hernia. No definite gastroesophageal reflux is identified. The stomach is otherwise unremarkable. The duodenal loop and cap are also within normal limits.

IMPRESSION: Small sliding type hiatal hernia without demonstrable gastroesophageal reflux.

W. Fu, M.D.
11/24/75 nmr

HISTORY

HOSPITAL REGULATION:

All Positive and Important Negative Findings Shall Be Recorded

Date 3-31-77

ORDER OF RECORDING:

1. Chief Complaint 2. History of Present Illness 3. History of Past Illness a) childhood b) adult c) operations d) injuries 4. Family History 5. Social History 6. Systemic Review a) General b) Skin c) Head-Eyes-Ears-Nose-Throat d) Neck e) Respiratory f) Cardiovascular g) Gastrointestinal h) Genitourinary i) Gynecological j) Locomotor k) Neuropsychiatric 7. Signature

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CHIEF COMPLAINT: Neck and back pain

HISTORY: Mr. Riley is a 53 year old male that for the last few days has been complaining of low back pain that started without significant history of injury. Yesterday he cut his lawn and had some soreness on his back that was more severe than usual. Today he was just working around the garden and he stated that his back locked on him with fierce pain that made him unable to move. He could not even sit and had to lie against a counter until the Rescue Squad came and picked him up and brought him to the ER.

In addition he has been also complaining of neck pain of diffuse location which is more severe on turning movements. The patient has had problems with his neck since 1970 and was admitted to his [sic] hospital once because of symptoms suggestive of radiculopathy. Following discharge he has been followed in my office on an outpatient basis. His symptoms have been controlled fairly well with medications, physical therapy and postural exercises.

PAST HISTORY: His father died at age 72 of diabetes. The mother is 66 and has heart disease. He has four sisters, two have high blood pressure.

He has had surgery on the left leg from a war wound. He had a fracture of the right shoulder and fracture of the right arm. The patient is allergic to *Penicillin*.

REVIEW OF SYSTEMS: The patient complains of occasional headache but [sic] visual disturbances. The patient has had a history of chest pain in the past and he was diagnosed as having sliding hiatal hernia. He has not had acute symptoms in the last year.

/s/ G. SANCHEZ
G. Sanchez, M.D.

GS/dlh
3-31-77d
4-1-77t

Name—RILEY, Ralph Hospital No. 2E5

PHYSICAL EXAMINATION

HOSPITAL REGULATION:

All Positive and Important Negative Findings Shall Be Recorded

Date 3-1-77 [sic]

ORDER OF RECORDING:

1. General 2. Skin 3. Eyes 4. Ears 5. Nose 6. Mouth 7. Throat 8. Neck 9. Chest 10. Heart 11. Abdomen 12. Genitalia 13. Lymphatic 14. Blood Vessels 15. Locomotor 16. Extremities 17. Neurological 18. Rectal 19. Vaginal 20. Diagnosis 21. Signature

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On examination the patient is alert and oriented. He appears extremely anxious and appears in pain. He was even unable to move on the stretcher.

Prior to my arrival the ER physician had given him 100 mg. of Demerol and 25 mg. of Vistril and this has calmed him down a little. The patient says this had not even touched the pain.

HEAD AND NECK: Normal cephalic. The scalp is clear. The neck shows marked decrease in the range of motion to the rotational movements with tenderness on the midline.

THYROID: Not palpable.

CHEST: Normal expansion.

HEART: Sounds are normal. S1 is normal. A2 is greater than P2.

ABDOMEN: Soft, bowel sounds are active.

Neurology of the upper extremities is unremarkable.

Examination of the back reveals some spasm and tenderness throughout the lumbar area. This is more severe at

the lumbosacral area. Motion could not be tested. Examination was performed only on the prone and supine positions because the patient was barely able to move.

Straight leg raising test was 30 on each side and the maneuver is negative. The reflexs are present. The sensation is objectively normal.

DIAGNOSIS: Acute Lumbo-sacral Strain

/s/ G. SANCHEZ
G. Sanchez, M.D.

GS/dlh
4-1-77t
3-31-77d

Name—RILEY, Ralph

PHYSICIAN'S MEMORIAL HOSPITAL

FINAL SUMMARY SHEET

NAME: RALPH RILEY

HOSPITAL No. 46055

ADMISSION DATE: 3-31-77

DISCHARGE DATE: 4-09-77

ATTENDING PHYSICIAN: G. E. SANCHEZ, M.D.

CHIEF COMPLAINT: Neck and back pain.

HISTORY: Mr. Riley is a 53-yr. old male that for the last few days prior to admission has been complaining of low back pain that started without significant history of injury. On March 30, 1977, he mowed his lawn and had some soreness on his back that was more severe than usual. On March 31, 1977, he was just working around the garden and he stated that his back locked on him with fierce pain that made him unable to move. He could not even sit and had to lay against the counter until the Rescue Squad came and picked him and brought him to the Emergency Room.

In addition, he has also been complaining of neck pain of diffuse location which is more severe on turning movements. The patient has had problems with his neck since 1970 and was admitted to this hospital once because of symptoms suggestive of radiculopathy. Following discharge he has been followed in the office on outpatient basis. His symptoms have been controlled fairly well with medication, physical therapy and postural exercises.

PAST HISTORY: His father died at the age of 72 of diabetes. The mother is 66 and has heart disease. He has four sisters, 2 have high blood pressure. The patient had surgery on the left leg from a war wound. He had a fracture of the right shoulder and a fracture of the right arm. The patient is allergic to Penicillin.

REVIEW OF SYSTEMS: The patient complained of occasional headaches without visual disturbances. The patient has had a history of chest pain in the past and he was diagnosed as having a sliding hiatal hernia. No signs of acute myocardial infarction were ever found, although he has been in ICU for chest pain.

PHYSICAL EXAMINATION: On examination the patient is alert and oriented. He appeared extremely anxious and in pain. He was even unable to move on the stretcher. Prior to my arrival in the Emergency Room, the physician had given him 100 mg. of Demerol and 25 mg. of Vistril and this had calmed him down a little bit. The patient says that the medications has not even touched the pain.

Head and neck—normocephalic, scalp is clear. The neck shows marked decrease in the range of motion to rotational movements with tenderness in the midline. Marked paraspinal muscle spasm is palpable. There is no thyroid or lymph node enlargement. The chest has normal expansion. The heart sounds normal. S1 normal. A2 greater than P2. Abdomen soft, bowel sounds active. Neurological of the upper extremities is unremarkable. Examination of the back revealed some spasm and tenderness through out the lumbar area. This is more severe at the lumbosacral angle. Motion could not be tested. Examination was only performed on the prone and supine positions, because the patient was barely able to move. Straight leg test ws [sic] 30° on each side and the lassage's [sic] maneuver was negative. The reflexes were present. The sensation was objectively normal.

LABORATORY EXAMINATIONS: The chemical profile was essentially within normal limits. The RPR was non-reactive. The CBC showed a hemoglobin of 14.7, hematocrit 44, WBC count was 6,900 with 9 bands, 70 segs, 3 eosins, 2 basos, 16 lymphs, the platelet count was adequate. The urinalysis was within normal limits.

RADIOGRAPHIC EXAMINATIONS: X-ray of the cervical and lumbosacral spine were taken. The cervical spine showed degenerative arthritis on the lumbosacral spine. There are no acute findings.

ADMITTING DIAGNOSIS: Acute lumbosacral strain. Cervical spondylosis. Hiatal hernia.

HOSPITAL COURSE, TREATMENT AND PROGRESS: The patient was admitted to the hospital and placed on bedrest with pelvic traction and medications in the form of Valium and Demerol. Initially the pain was described as constant with the patient complaining most of the time. Neurological examination failed to yield evidence of neurological deficit. Gradually the symptoms of the neck improved first and then his back and then physical therapy was started with intermittent cervical traction, ultrasound and moist heat with postural exercises and the condition of the patient improved to the point that he can be discharged to be followed in the office with the following instructions:

1. Bedrest with moderate activity.
2. Use brace when up that has been fitted here.
3. Take Valium and Tylenol #3 for pain.
4. Heating pad and firm matress. [sic]
5. Return to the office in about 10 days for evaluation.

/s/ G. E. SANCHEZ
G. E. Sanchez, M.D.

GES/cd
T: 4-221-77 [sic]
D: 4-21-77

OMB Approval No. 44-R1272

SA 322

EMPLOYEE'S CLAIM FOR COMPENSATION

DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMPENSATION PROGRAMS

1. OWCP No. 100376

2. Carrier's No.

SEE INSTRUCTIONS ON REVERSE

3. Name of person making claim (Type or print): First: Ralph; Middle initial: E; Last: Riley

4. Date of injury (Month/day/year): November 19, 1975

5. Claimant's address (Number, street, city, state, ZIP code): Route 1, Box 46A, Indian Head, Maryland 20640

6. Marital status: married

7. Sex: [X] Male [ ] Female

8. Age or date of birth (Month/day/year): 1/1/24

9. SOCIAL SECURITY NUMBER (Not required by law): 195 | 22 | 3843

10. Did injury cause loss of time beyond day or shift of accident? [X] Yes [ ] No

11. On date of injury give: a. Hour began work [ ] A.M. [ ] P.M. 2:30 b. Hour of accident [ ] A.M. [X] P.M. c. Did you stop work immediately? [ ] Yes [ ] No

12. Date and hour pay stopped [ ] A.M. [ ] P.M.

13. Date and hour you returned to work: temporary total disability 11/19/75-present

14. Occupation (Job title: longshore worker, welder, etc.): Sheet Metal

15. Injured while doing regular work? [X] Yes [ ] No (If "No," explain in Item 24)

16. Wages or earnings when injured (Include overtime allowances, etc.): a. Weekly: $ 291.07 b. Total earnings during year immediately before injury.

17. Has 3rd party or other claim been made because of this injury? [ ] Yes [ ] No

18. Number of years you worked for this employer: 2 mos.

19. Number of days usually worked per week:

20. Name of supervisor at time of accident: John Fury

21. Earliest date supervisor or employer knew of accident: Nov 19, 1975

22. Were you employed elsewhere during the week injured? [X] No [ ] Yes (If "Yes," state where and when on reverse.)

23. Exact place where accident occurred (Street address, city, town. Name of vessel, pier, terminal, etc.): Walter Reed Hospital, Washington, D.C.

24. Describe in full how the accident occurred (Relate the events which resulted in the injury or occupational disease. Tell what the injured was doing at the time of the accident. Tell what happened and how it happened. Name any objects or substances involved and tell how they were involved. Give full details on all factors which led or contributed to the accident. If more space is needed, continue on reverse.): Lifting duct work with co-worker, weighing approximately 500 pounds, felt sharp pain in neck and sat down.

25. Nature of injury (Name part of body affected--fractured left leg, bruised right thumb, etc. If there was a loss or loss of use of a part of the body, describe.): Cervical neck

26. Have you received medical attention for this injury? [ ] No [X] Yes (If "Yes," give name and address of doctor, clinic, hospital, etc.): Drs. A. Pavot, 1310 Southern Ave, SE Wash, DC; H. Burke, La Plana, Md; L. Naguigad, Oxon Hill, Md.; R. Sealattar, Wash, DC; Sanchez, La Plata, Md.; Herbert Misorsky, Oxon Hill, Md.

27. Were you treated by a physician of your choice? [X] Yes [ ] No

28. Will such treatment be furnished by employer? [ ] Yes [ ] No

29. Are you still disabled on account of this injury? [X] Yes [ ] No

30. Have you worked during the period of disability? [ ] Yes [X] No

31. Have you received any wages since becoming disabled? [ ] Yes [ ] No (If "Yes," give dates on reverse.)

32. Has injury resulted in permanent disability, amputation or serious disfigurement? [ ] Yes (Describe on reverse.) [ ] No

33. Name of employer (Individual or firm name): Federal Sheet Metal Inc.

34. Nature of employer's business:

35. Address of employer (Number, street, city, state, ZIP code): Walter Reed Hospital, Washington, D.C.

36. If accident occurred outside the U.S., state whether you are a U.S. citizen [ ] Yes [ ] No

37. I hereby make claim for compensation benefits, monetary and medical, under the _____ Act.

Signature of claimant or person acting in his or her behalf: [signature]

38. Date of this claim (Month/day/year): 12/16/75

Section 31 of the Longshoremen's Act, 33 U.S.C. 931, provides, as follows: Any person who willfully makes any false or misleading statement or representation for the purpose of obtaining any benefit or payment under this Act shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not to exceed $1,000 or by imprisonment of not to exceed one year, or by both such fine and imprisonment.

Form LS-203 (Rev. Mar. 1977)

111

Resp. # E Riley

RESPONDENTS' EXHIBIT E

RESPONDENTS' EXHIBIT F

Chart Copy

THE MORRIS CAFRITZ MEMORIAL HOSPITAL

ROENTOENOLOGICAL CONSULTATION REPORT

Patient—RILEY, RALPH Patient Dr.—WISOTSKY

OPD Age—46 Sex—M 123377 Date—4/1/70

CERVICAL SPINE: There is scoliosis convex to the left. Degenerative changes are noted about the C5 and C6 levels. The disc interspaces are relatively well maintained. The intervertebral formulae at the C5, 6 level on the left appear to be slightly compromised. No evidence of fractures or subluxations are noted.

7206

SHEET METAL WORKERS SA 324 102 PENSION FUND
2705 Bladensburg Road, N.W.
Washington, D.C. 20011

Resp. #G
Riley

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RESPONDENTS' EXHIBIT G

MEDICAL EXAMINATION REPORT

(To be completed by applicant's attending physician.)

Name: Riley (Last) Ralph (First) E (Initial)

Address: Rt 1 Box 46A (Number) (Street) Indianhead (City) Md (State)

Age 52 Height 6' Weight 180 lbs

1. HISTORY

(a) Date present illness began or injury occurred April 1970 Pati lost intermittent time from work but has been totally disa
(b) Date patient stopped work since November 19 1975.
(c) If illness, give previous history long history of arthriti cervical spine

2. GENERAL CONDITION

	At first visit (date)	At present (date)
(a) Ambulatory x		
(b) Confined to house		
(c) Bedridden		

3. SYMPTONS (Give all details as to type, description, frequency, aggravation and ameliorating factors, etc., with dates.)
pain at back of neck radiating to both arms, especially left; severe, disabling depressive syndrome; peripheral vascular insufficiency; hiatus hernia

4. FINDINGS ON PHYSICAL EXAMINATION (Give approximate dates.)

acute depressive syndrome

diagnostic studies made over the last 5 years

5. FINDINGS ON LABORATORY EXAMINATION (Give approximate dates.)

		Findings	Dates
(a)	Urine	diagnostic studies made over a period of the	
(b)	Serologic test for Syphilis	normal	
(c)	Blood Count	normal	
(d)	Blood Chemistry	Normal	
(e)	X-Rays and EKG (submit records- they will be returned)	osteoarthritis of cervical spine wit narrowing of cervical interspaces	
(f)	Special Procedures		
(g)	Other		

6. WAS PATIENT HOSPITALIZED? x (Yes) ___ (NO) (If yes, submit official hospital abstract.)

Name of hospital Physician's Hospital

Address of hospital La Plata Md

Admission date 11-20-75

Other identifying data

7. DID PATIENT UNDERGO OPERATION? ___ (Yes) x (NO) (If yes, give operative findings and tissue diagnosi

SA 326

8. COMPLETE DIAGNOSIS (Follow D[illegible] scheme of American Heart Association if cardiac, or National Tuberculosis Association if tuberculosis.)

degenerative osteoarthritis cervical spine

cervical radiculitis

disabling, anxiety depressive syndrome

~~peripheral vascular insufficiency~~

hiatus hernia

9. TREATMENT (Give type and dates.) formal physical therapy to cervical spine; reassurance; limitation of activity

Date of first visit 1970

Frequency of visits as necessary

Date of last visit 2-9-76

Are you still the physician on the case? ___x(Yes) ____(No)

Has the patient refused any treatment? ____(Yes) ___x(No)

10. COURSE OF ILLNESS OR INJURY gradually progressive
(To What degree?)

Recovered

Improving

Not changing

Downhill

11. DEGREE OF DISABILITY

(a) Has the patient been able to do any kind of work since the illness or injury? ____(Yes) ___x(No)

(b) If yes, give date of termination of total and complete disability.
indefinite

(c) If yes, what kind of work does (did) the patient perform?

(d) If no, do you think the patient will be able to work in the future?

____(Yes) ____(No) If yes, when?

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12. GIVE NAMES AND ADDRESSES OF ALL OTHER PRACTITIONERS OR PHYSICIANS WHO HAVE ATTENDED THE PATIENT IN THIS ILLNESS OR INJURY.

Dr. A Pavot, 1310 Southern Ave SE Washington DC

Dr. H Burke, La Plata Md

Dr. L Maguigad, St. Barnabas Rd., Oxon Hill Md

~~Dr. R. Sealettar, Washington, DC~~

Dr. Sanchez, La Plata Md

13. ADDITIONAL NOTES:

I hereby certify that the above answers are true and complete to the best of my knowledge and belief.

Herbert Wisotsky

Date 2-16-76 Signature Herbert Wisotsky M.D.

Address 6188 Oxon Hill Rd Oxon Hill

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No. 78-DCWC-82
OWCP No. 100376

In the matter of:

RALPH RILEY, *Claimant*,

vs.

FEDERAL SHEET METAL, *Employer*,

and

INSURANCE COMPANY OF NORTH AMERICA, *Carrier*.

Oxon Hill, Maryland
Friday, May 5, 1978

DEPOSITION OF: HERBERT WISOTSKY, M.D.

called for oral examination by Counsel for the Claimant at 6188 Oxon Hill Road, Oxon Hill, Maryland, 20021, beginning at 1:30 p.m. on Friday, May 5, 1978, before Judith A. Derenberger, RPR, a Notary Public in and for the State of Maryland, when were present on behalf of the respective parties:

FOR THE CLAIMANT:
ASHCRAFT, GEREL & KOONZ
By: JAMES F. GREEN, Esquire
2101 L Street, N. W.
Washington, D. C. 20037

[2] FOR THE CARRIER AND EMPLOYER:
RICHARD W. GALIHER, JR., Esquire
1215 Nineteenth Street, N. W.
Washington, D. C. 20036

CONTENTS

	Examination on Behalf of:	
Witness:	CLAIMANT *(Mr. Green)*	EMPLOYER-CARRIER *(Mr. Galiher)*
Dr. Herbert Wisotsky	3, 29	11, 32

EXHIBITS

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Wisotsky Deposition Exhibit 2 (Report, 12-9-75)	16
Wisotsky Deposition Exhibit 3 (Report, 1-21-76)	16

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[3] Thereupon,

Herbert Wisotsky, M.D.

having been duly sworn by the Notary Public, was examined upon his oath and testified as follows:

EXAMINATION ON BEHALF OF THE CLAIMANT

By MR. GREEN:

Q. Doctor, would you please state your full name and professional address for the record.

A. Herbert Wisotsky.

6188 Oxon Hill Road, Oxon Hill, Maryland.

I am a physician.

Q. Doctor, as you were just told again my myself, we are here on the [sic] a Workmen's Compensation claim and if

there are any questions that I am asking that you don't understand, please ask me to repeat it and I will be happy to do so before you answer.

Could you, Doctor, give us a brief resume of your professional background.

A. Graduated from New York University in 1946. Started general practice in Oxon Hill, Maryland, 1949. Been here since.

Q. Doctor, are you a member or fellow of any Boards, or societies?

A. American Medical Assocition. D. C. Medical Society. Prince George's Medical Society.

Q. Doctor, are you licensed to practice in any other [4] states or territories other than Maryland?

A. I am licensed to practice in Maryland and the District.

Q. Do you engage, sir, in the practice of any particular specialty in medicine?

A. I do family practice. I understand that is getting to be a specialty these days.

Q. I understand that it is, Doctor.

MR. GREEN: Do you have any questions on voir dire?

MR. GALIHER: Are you an internist, Doctor?

THE WITNESS: No.

MR. GALIHER: Are you a member of the Board of the American Academy of Family Practitioners?

THE WITNESS: American Board of Family Practice.

MR. GALIHER: When did you secure that certification?

THE WITNESS: 1955.

MR. GALIHER: What hospitals are you staffed at?

THE WITNESS: Greater Southeast Community Hospital, Southern Maryland Hospital.

MR. GALIHER: Is that the new one down here?

THE WITNESS: Yes.

MR. GALIHER: I don't have any other questions at this time.

By MR. GREEN:

Q. Doctor, I would like to direct your attention to records that you may have with you concerning Ralph Riley, [5] your patient. Specifically, Doctor, I would like to ask you if you saw Mr. Riley for a work injury in November of 1975.

A. I saw Mr. Riley subsequent to that injury. He came to see me December 5, 1975, having been discharged from the hospital. Just about that. Discharged from La Plata Hospital. Well, Physicians Memorial Hospital in La Plata, Maryland.

History I got from him was he was admitted approximately three weeks before that——

MR. GALIHER: The history you got from him, is this what you are relating?

THE WITNESS: Yes.

MR. GALIHER: Okay.

THE WITNESS: It was under the care of Dr. Burke.

By MR. GREEN:

Q. Doctor, did you obtain a history from Mr. Riley concerning his work history?

A. Just very briefly he stated he was injured at work. Went to the hospital and was under the care of Dr. Burke.

Q. What did you do for Mr. Riley when you saw him, sir?

A. I saw Mr. Riley on December 5 and at that time he was complaining of intermittent shaking chills for the preceding week. I had him have a series of lab studies done, a

complete blood count, blood cultures to eliminate any type of infection that was causing this problem.

I decided and since those tests were normal, decided [6] that he had a marked anxiety depressive reaction to his longstanding arthritis which had been recently exacerbated and referred him to a specialist for his arthritis and cervical radiculitis and also referred him for psychiatric care in the hope that that could help him cope with this problem.

Q. Doctor, it is your testimony he presented complaints to you on that visit of cervical arthritis problem and of cervical radiculitis?

A. Yes.

Q. What physician did you refer him to, Doctor?

A. Dr. Raymond Scalettar, who is an expert rheumatologist in Washington.

Q. Doctor, you referred to the fact that Mr. Riley had a long-standing arthritis condition.

A. Yes.

Q. Would you be able to tell, sir, from a review of your notes when you first came to diagnose that condition?

A. From a quick survey of the notes I see I wrote a letter in July of '77 saying since 1970 this man has had to lose work intermittently because of his cervical arthritis, so it goes back at least until '70.

Q. Doctor, in that letter of July 16, I believe to the insurance company of North America, you indicated in the second full paragraph beginning in November 1975, that paragraph, Doctor, you indicated the history of an injury to Mr. [7] Riley.

A. That is true.

Q. And could you repeat for this record what that history was, sir?

A. In November 1975 this patient was struck on the back of the neck while working and as a result of this injury

was hospitalized at Physicians Memorial Hospital, La Plata, Maryland, under the service of Dr. Henry L. Burke.

Q. Doctor, do you have a recollection as to how you obtained that history of a striking injury to the back of Mr. Riley's neck?

A. The only place I could have gotten that history was from the patient.

Q. Did you refer Mr. Riley to any other specialist as a result of his arthritis and cervical radiculitis?

A. If we go down the rest of the paragraph.

Q. Yes, sir.

A. During that hospitalization the patient was seen in consultation with Dr. Sanchez who is an orthopedic surgeon practicing in La Plata, Maryland. He checked him of course at that time.

You are looking for previous orthopedic or arthritic consultations?

Q. Yes, sir, or any previous indication of the severity of Mr. Riley's arthritis.

[8] A. Well, as I say I have been treating him for this particular condition at least since 1970 and usually I will continue to treat the patients here in this office for a disease like degenerative osteoarthritis with nerve root pressure unless they become worse or incapacitated and then I will send them out for a referral.

In this particular case I sent Mr. Riley to the physical therapy department at Cafritz, at that time was Cafritz Memorial Hospital, Washington, D. C. The physiatrist Alfred Pavot wrote a letter about his findings and impressions on April 23, 1970.

Q. Doctor, did Dr. Pavot confirm your suspicion that Mr. Riley had cervical arthritis?

A. Yes, he did. He did a lot of testing and he repeated the x-rays of his cervical spine. His diagnoses were de-

generative arthritis of the cervical spine, probable cervical radiculitis and left trapezius decompensation.

He recommended he be placed on a program of physical therapy, re-evaluation at his clinic from time to time. As I remember he did those follow-up examinations.

Q. Doctor, from that point in 1970 forward Mr. Riley continued to see you in this office, sir?

A. Yes.

Q. Doctor, in your letter of July 16, 1977, to the Insurance Company of North America you indicated an opinion as [9] to whether or not the accident of November 19, 1975 affected Mr. Riley's condition that you had diagnosed and treated since 1970. I would like to ask you now, Doctor, based on the history that the patient gave you of his injury in 1975, November of 1975, at work and the medical examination that you have done on Mr. Riley and treated him over the course of years, do you have an opinion you can state with a degree of reasonable medical certainty as to whether or not Mr. Riley's work injury in November 19, 1975, aggravated his pre-existing osteoarthritis of the cervical spine to the point of total infirmity?

MR. GALIHER: Objection. For the record the doctor's report does not say total infirmity. It just says that it definitely aggravated the pre-existing osterarthritis [sic] of the cervical spine. I think you are asking two questions at the same time.

MR. GREEN: I may be so let's separate that and deal with any possible objection.

By MR. GREEN:

Q. Doctor, given the basis for your opinion that I have already stated for the record, do you have an opinion as to whether or not the accident of November 19, 1975, aggravated Mr. Riley's pre-existing arthritic cervical condition?

A. Yes. I am confident that it did.

Q. And your opinion is it did?
[10] A. Yes.

Q. Do you have an opinion based on the information already in the record whether or not the accident of November 19, 1975, aggravated Mr. Riley's pre-existing osteoarthritic condition of the cervical spine to the point of total infirmity from work?

MR. GALIHER: Objection.

You can go ahead and answer.

By MR. GREEN:

Q. Doctor, you may answer over the objection.
A. I am confident that the injury aggravated his preexisting arthritis. The man is certainly disabled from working. If you are asking me what the injury that he received, the cause of his present total disability, I would have to say probably yes.

Q. All right, sir. Could you say that probably yes with a degree of reasonable medical certainty?
A. I think with a relative certainty, probably yes.

Q. Doctor, do you have an opinion based on your treatment of this man as to whether or not his arthritic condition will improve?
A. I do not feel that his arthritic condition will improve. Arthritis, of course, has remissions and exacerbations and is a peculiar disease in general but in this particular patient I do not feel that he will improve sufficiently to [11] where he will be employable.

Q. Doctor, do you have a recollection today suggesting to Mr. Riley after his injury in 1975 to retire from his occupation as a sheet metal worker?
A. Oh, yes. I know I have told Mr. Riley to retire from his occupation.

Q. And at Mr. Riley's request I would imagine, sir, did you complete a form for Sheet Metal Workers Local 102 Pension Fund? Do you have a recollection of doing that, sir?

A. I completed retirement forms for Mr. Riley both from his union and work and as well I think for Social Security.

Q. Yes, sir.

MR. GREEN: I have nothing further on direct.

Thank you, Doctor.

EXAMINATION ON BEHALF OF THE EMPLOYER AND CARRIER

By MR. GALIHER:

Q. Doctor, could we take about a two minute break and could I see all the records you have including your treatment cards of Mr. Riley?

A. Sure. They go back to 1966. That is the beginning. As you see out here in the country we have brief records. It is not like some of the city physicians.

(Whereupon, a discussion ensued off the record.)

By MR. GALIHER:

Q. Doctor, what I would like to do first is start with [12] your treatment records and have you indicate from there the first time that Mr. Riley in your treatment cards ever complained about any kind of arthric [sic] problem.

A. March of 1970.

Q. And at that time did you have X-rays taken?

A. Someplace I think I had some old X-rays on him. X-rays were taken in April of 1970.

Q. What did they reveal?

A. X-rays of the cervical spine show arthritic changes with boney spur formation between C-4 and C-5 and C-5 and C-6. There seems to be some encroachment on the

intervertebral on the neuroforamina at the level of C-4 and C-5 and to a lesser extent 5 and 6.

Q. That information you are reading from is connected with Dr. Pavot's report?

A. Yes. Apparently what I did was send him over to Dr. Pavot for evaluation of what was apparent to me to be a cervical arthritis and what he does each time is run X-rays of the involved areas.

Q. I see.

I would like to ask that the reporter mark the Dr. Pavot's report with the X-ray report you just read as Deposition Exhibit 1.

I would like to get copies. If we can't get copies today, maybe you can send them to us and the court reporter. [13] Some of the medicals you have shown today we have not seen before.

A. Reports of the X-rays.

Q. Yes.

A. I think that would be easy.

Q. And Dr. Pavot's report.

Dr. Pavot mentions giving him physical therapy for a period of time. Did you or Dr. Pavot follow him on the physical therapy?

A. I don't know. I have no record of following him here. I feel that he actually went to Pavot for that series of physical treatments but I have no record here.

Q. Okay.

Let me have those reports, if I might, and we will have them marked Number 1.

This will be the report of Dr. Pavot. The Morris Cafritz X-report dated April 1, '70 and there is also D.C. General report dated February 14 but it doesn't say what year.

A. D. C. General.

Q. February 29, '72 is when this X-ray concerning broken ribs was.

A. Oh.

Q. Could I have this marked.

(Whereupon, the reports were marked for identification [14] as Wisotsky Deposition Exhibits 1 and 1-A.)

By Mr. Galiher:

Q. Doctor, would you look through your notes and tell me the next time you have any reference to the arthritis problem.

A. We are talking about 1970. I saw him in May and then in July.

Q. What was the complaints and treatment at that time?

A. He was improving in May. I saw him in July and he had recurrent pain in the back of the neck following an injury in his car.

Q. Then when did you see him after that?

A. November of 1972.

Q. November '72 what did you see him for?

A. He had pain again in the back of his neck.

Q. Did he give you any particular history at that time?

A. No. Just complained of pain in the back of the neck. He had on physical examination a cyst on the back of his neck.

Q. What treatment was recommended and given at that time?

A. Symptomatic treatment for the pain and discomfort.

Q. Would that be analgesics?

A. Analgesics.

Q. Now, would you keep going to the next time that he made any reference or you made any reference to your

notes to [15] his neck or arthritis and if you come across the anxiety depressive note, pick that up along the way.

A. Okay.

The next time I saw this man was August '74. He complained of left neck, left chest, left arm pains and I gave him again some analgesic for that after checking him out and feeling comfortable that he had no severe underlying problem.

In June I will take that back. In May 1975 he was off work because of arthritis pains and in June of '75 I saw him here in the office again off work because of pain in his neck, shoulders and arms and also his knees at that time.

Q. When did you next see him?

A. This is all 1975.

Q. When did you see him next after June '75?

A. July of '75 he came in because of arm and shoulder pains. December of '75 I have a note about his anxiety.

Q. What was the date of that?

A. December 1, 1975.

Q. Would you read us that note.

A. "Anxiety."

Q. That is all, "Anxiety"? One word?

A. One word. Snap diagnosis.

Q. After December 1, 1975, when did you next see him?

A. December 5, '75. That is when he came in with the [16] shaking, chills.

Q. Would you read us that complete note?

A. "Shaking, chills, intermittent one week. Hospitalized three weeks ago at La Plata Hospital, possible cardiac disease. Discharged from hospital with no diagnosis of heart disease."

Then I sent him to the laboratory for a complete blood-count, SMA 12, blood cultures. Also to Scalettar for the

arthritis consultation and to Maguigad which would be for psychiatric consult.

Q. Now, I would like to have marked Dr. Scalettar's report dated December 9, 1975, as Deposition Exhibit Number 2; and Dr. Maguigad as Number 3.

(Whereupon, the reports were marked for identification as Wisotsky Deposition Exhibits 2 and 3.)

By Mr. Galiher:

Q. Now, Doctor, on December 1, 1975, or December 5, 1975, did you receive any history from Mr. Riley of an injury at work?

A. I have no record on the chart of having received any history from him about an injury at work.

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[17] Q. Now, when after December 5, '75, did you next see him?

A. December 12, 1975.

Q. What was happening at that time?

A. I have a note here, "Continues disabling anxiety state."

I have a note also that I had gotten Dr. Scalettar's letter confirming the osteoarthritis.

Q. Okay.

Now, if you would refer to Dr. Scalettar's letter a minute, does Dr. Scalettar mention anything about an injury on the job to his neck at work?

A. No.

Q. When did you next see Mr. Riley?

A. January 2, 1976.

Q. What was his condition at that time?

A. Still depressed. I continued his medication for his arthritis and an antidepressant.

Q. What was his depression about during that period of time; if you recall?

[18] A. Mr. Riley was depressed because he was unable to work and function. He felt that he was just physically unable to work any longer and this or at this [sic] point he was about 42 years old and this [sic] I feel confident this was depressing him.

Q. Was this his initial problem when he came in to you on December 1 when you said anxiety or on December 12th?

A. Yes. He was nervous, tense, upset, unable to eat, depressed, and in talking to him the only thing I could find that was depressing him was his physical disability.

Q. Okay.

When did you first become aware of the accident that happened to him that he reported what happened at work? Do you have anything in your notes about that?

A. I have nothing in my notes and I don't know how I could answer that question. We may have discussed it any of those times he came in upset to see me that month following his hospitalization, but I have nothing in my notes to confirm that.

Q. Well, initially when you were answering Mr. Green's questions, you indicated that when he came in on December 5, '75, that you read a history that he was injured at work, taken to a hospital under Dr. Burke's care. Where did you read or get that information from if it is not in your handwritten notes?

A. Was that my letter to someone?

[19] Q. Yes.

A. I must have gotten that information from Mr. Riley.

Q. That letter is written July 16, 1977. Can you tell us when in the interim period between November of 1975 and July 16, '77, when you wrote that letter to the Insurance Company of North America you received this information?

A. No. I can't. This had to have been verbal information from the patient.

Q. Well, now I notice in your records that periodically throughout the time you have rendered reports to the sheet metal local fund or something like that with respect to his treatment.

A. Unfortunately that is true. He would come in frequently for those reports.

Q. What would those reports be? Would they be verification of time off from work or what was the nature of these different reports?

A. They would be not only verification of time off from work if he lost time but also stated he was still having a problem with his neck.

Q. Now, would you look through your records, Doctor, and I don't think it will take too much time and give us the dates of each time you rendered such a report to the Sheet Metal Workers.

It is in the corner by that little line here.

[20] A. Every time my nurse types it up from the dictating machine?

Q. Right.

A. 6-16-75. 6-17-75. 8-1-75.

You want just the Sheet Metal Workers and not the Aetna?

Q. Either one. Do Aetna also if you would.

A. Okay.

12-5-75. 3-12-76. 8-6-77. 10-28-77.

Did I give you 4-11-77?

Q. No.

A. 4-11-77.

3-15-78. 4-17-78.

Q. Now, were all of these reports you mentioned beginning June 15, '75, to your recollection dealing with the

arthritis and the cervical problem he complained about since 1970?

A. I am confident that this dealt with the arthritis every single time, every time.

Q. How about before June 16, '75, that was the first date you gave us. Can you go back further in your records and see if there are any before that date?

A. Here is one to Sheet Metal Workers, August 1974. One in November of 1974 which I think predated the date that you people are interested in.

12-5-72. May 25, '70.

[21] (Whereupon, at the Doctor's request a recess was taken.)

By Mr. Galiher:

Q. Doctor, we were on your treatment card and we were on the date of January 2, 1976, which you follow up there on the treatment card.

A. January 2, '76, he came in depressed. I continued his medication for his arthritis and his depression. I saw him again February 6. He was slightly improved. I continued the medication.

Q. What was his next visit after that?

A. February 9 at which time I wrote out or sent out a letter to somebody for his retirement.

Q. Now, let me show you—I don't have the back page of it but this is a document that has been marked in the transcript as Respondent's Exhibit G and the back page is dated February 16, 1976.

Mr. Green will confirm that for you.

Is this the retirement summary that you wrote out on February 9, 1976? Why don't you show him your copy.

Doctor, Mr. Green will show you the last page of that document.

A. Good.

Q. Do you remember filling out that document?

A. Vaguely.

[22] Q. Did that document bear your signature?

A. Yes. We signed it.

Q. Now, Doctor, if you would, had Mr. Riley ever discussed with you prior to February 9, 1976, retirement for any reason?

A. February 9, 1976 is a couple months after his accident. This of course would all be my recollection. I feel that I talked with Riley about his retiring even before this accident because of his cervical arthritis. I know my arguments may have been a little reinforced after the accident because he came in and he was in worse shape than he had been before.

Q. Doctor, you don't have in your medical records your treatment records that we have gone through the date of this accident. We have covered the period up until you wrote the retirement summary. Now, the retirement summary itself does not mention, does it, anything about an accident as such?

A. No. It does not.

Q. So would it be fair to say even at that time when you wrote this retirement summary that you didn't know he had had an accident at work at that time?

A. No. I don't think it would be fair to say that. I may not have put it in here and I may not have put down the fact the accident is the reason why he should have retired. I thought he should retire because of the disability. That is [23] the arthritis, radiculitis, pressure and the cerebral vascular insufficiency.

Q. Doctor Maguigad's report previously marked in this case as Deposition Exhibit Number 3 indicates a manifestation of some type of a—for want of a better word——

A. Neurosis.

Q. Yes. You hit it. A cardiac neurosis. When did this first become evident to you as his treating physician?

A. Well, if you are going to restrict yourself to a cardiac neurosis, I think you will have to say basically that dates from his hospitalization in November of '75.

Q. Did he have any concern prior to that hospitalization in November '75 that you are aware of of borderline high blood pressure or any other findings which you may have made to him suggestive of the possibility that he should watch his health with regard to a heart situation?

It is noted in other records that he has a family history and this type of thing.

A. On occasion he would come in here and his blood pressure would be a little elevated. I would really downplay that a little bit because he would come in on other occasions and his blood pressure would be normal and I hate to overtreat my patients because that way you really make neurotics out of them.

Q. Was this blood pressure a problem you had at least [24] observed and noted?

A. On a random finding he had a blood pressure in August of 150 over 110 which I think anybody will say is a little elevated, but then he would come in here a few days later and it would be 130 over 90 which is certainly normal.

Q. Did he have a family history also of heart disease?

A. I don't remember that.

Q. Okay.

Now, what was the—You have testified in this case that in your opinion what you described or what you received as the description of what happened to him in November of

1975 on the job aggravated his cervical arthritis; is that correct?

A. That is true.

Q. Now, to what extent was that aggravated?

A. I don't think I can answer that question.

Q. Why not?

A. Because I really don't know enough about percentages on disability on these sprain, strains and arthritis problems to give you a percentage. All I can tell you is that it certainly aggravated him enough so he was disabled and it also I am confident, influenced his anxiety too. The entire picture I know was aggravated by his accident or I I feel it was anyway.

Q. Having known and said in this deposition that aggravation of arthritis is a—It is a remission situation, [25] you aggravate it and then it is in remission and then back and forth; is that correct?

A. Yes.

Q. Do you have any opinion as to if Mr. Riley sustained an aggravation of his arthritis sometime in November of '75 as your history in the letter of July 16, '77 indicates? Can you tell us for what duration looking at your notes that this aggravation of November '75 extended?

A. I don't think I could tell you that even if I looked at the notes. I feel whatever happened to him in '75 aggravated his neck. Gave him pain and started off a reaction of anxiety depression on this man which in itself is disabling and he just went down hill from there. He worried about what was going to happen to him and what was happening to him and I feel not only was his cervical arthritis and cervical radiculitis and associated pain disabling to him, but the fact he was upset about it was equally disabling.

Q. Doctor, when he went to Dr. Maguigad in January 21, 1976, he told Dr. Maguigad that he felt his medical condition had been gradually deteriorating since 1969 and

seemed to feel that in the last few months he has been increasingly fearful of the safety particularly at work. Has he ever discussed that with you?

A. Yes.

Q. About his feeling that his health was deteriorating?

[26] A. Yes. Riley told me that on many occasions. A lot of my patients tell me their health is deteriorating.

Q. What was deteriorating is this, the cervical arthritis problems or were there any other conditions he felt were deteriorating factors also?

A. As I remember it not only was his neck bothering him intermittently and especially when he did some work and I recommended he retire from this job before this, but his anxiety was certainly bothering him enough so that he felt different things in his environment and health were failing.

Q. This has been a long-term situation with Mr. Riley; is that correct?

A. Yes.

* * * * * * * * * *

[30] Q. However, is it your testimony that you have a recollection of Mr. Riley telling you of a work injury shortly after he came under your care in December of 1975?

MR. GALIHER: Objection. I don't think that is what the testimony has been.

By MR. GREEN:

Q. I said if it has been your testimony.

The doctor can answer the question if it has been his testimony, his recollection or not.

A. I know Mr. Riley told me that he had an injury at work and subsequent to that had all of this hospitalization, medical workup down in La Plata, orthopedic consultation, cardiac consultation and was coming back to me for follow-up.

[31] Q. Doctor, do you have a recollection of speaking to Dr. Sanchez concerning Mr. Riley's treatment?

A. No. I don't think I ever spoke to Dr. Sanchez.

Q. Doctor, again for the purposes of the record when you made your notations to the Sheet Metal Fund, the report to be sent to them, is that the insurance fund for the Sheet Metal Workers?

A. Yes. That is a slip of paper and that is why there is not a copy in my record but I don't keep many copies anyway. The patient comes to me with a form to whatever organization he wants it reported to and I dictate on that and send the form out of here. The girl usually makes a note on the chart that she sent such a form.

Q. Doctor, in Dr. Maguigad's report which is Deposition Exhibit 3, in the second full paragraph of that report, Doctor, Mr. Riley presents himself on January 21st, 1976, with a neck collar on, cervical collar I would imagine. Do you have a recollection of prescribing that cervical collar for him?

A. No. I have no recollection of prescribing it. I don't know whether he was discharged from the hospital with Dr. Sanchez' recommendation that he have it or whether we just talked it over and thought we would put it on empirically to see whether it would help. I don't ever recall seeing him in a collar.

Q. Doctor, one final question for the record. Your last [32] time that you saw Mr. Riley in this office was on what date, sir?

A. April 17, 1978.

Q. At that time, Doctor, do you have an opinion as to whether or not Mr. Riley was capable of gainful employment as a result of his cervical arthritis?

A. At that time I felt Mr. Riley could not go to work.

Q. Thank you. I have nothing further.

FURTHER EXAMINATION ON BEHALF OF THE EMPLOYER AND CARRIER

By Mr. Galiher:

Q. As a result of the cervical arthritis or as a result of what other conditions?

A. I have a note down here he is still totally disabled and I am confident it was the entire picture that made me feel he could not go to work. His cervical and neck pain. His anxiety. Basically those two diagnoses.

Q. Under anxiety——

A. I can't really separate those two reasons for his being unable to work. If someone has a heart attack and can't work, then of course you have one reason why the man can't work because he had a heart attack, but if the man has three different reasons all of which sort of overlie one another, it is difficult for me to pull one apart from the other and say if the man did not have this, then he could work.

Q. Do you include, Doctor, under that term anxiety the [33] cardiac neurosis?

A. I think that—I didn't mean to interrupt your question.

Q. Right.

A. But I think that cardiac neurosis is a manifestation of anxiety and whether he came in worried about his heart or whether he was worried about somebody in Baltimore going to come down to shoot him or whether he was going to be unable to do any other bodily functions, it is all a manifestation of his anxiety. The only reason we have a special name for it now the cardiologists have coined this fancy term. We send them all because we are afraid we may miss a heart attack or something.

Q. I notice in this instance you did send him to a cardiologist and I am not going to have his report marked but——

A. Dr. Nachnani.

Q. N-a-c-h-a-n-i.

This doctor saw him February 27, '78, and the doctor apparently did a stress test on him, did he, treadmill?

A. I think he did because that is one of the reasons I sent him there.

Q. What was the doctor's diagnosis, Doctor, for the record? It is the last line of that report.

A. The last line of the report just states the EKG is [34] within normal limits and a chest X-ray reveals normal heart size. His impression, would you like them?

Q. Yes.

A. Impressions are and, "I feel that pain in the chest and numbness in the arms is not cardiac in origin but may be due to cervical arthritis with radiculopathy. I do not find any evidence of peripheral arteriosclerosis. Two is hiatal hernia. Three is hypercholesterolemia and four is borderline hypertension.

Q. Basically Mr. Riley doesn't have anything that he should be worrying about as far as his heart; is that right?

A. You will never be able to convince Mr. Riley of that.

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[35]

CERTIFICATE OF SHORTHAND REPORTER—NOTARY PUBLIC

I, Judith A. Derenberger, the officer before whom the foregoing deposition was taken, do hereby certify the witness, Herbert Wisotsky, M. D., was by me duly sworn; that the testimony was taken by me stenographically and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to this litigation and have no interest, financial or otherwise, in the outcome of this matter.

In witness whereof, I have hereunto set my hand and affixed my notarial seal this 15th day of May, 1978.

Notary Public in and for
Montgomery County, Maryland

My commission expires
July 1, 1978.

WISOTSKY DEPOSITION EXHIBIT 1

THE MORRIS CAFRITZ MEMORIAL HOSPITAL

1310 Southern Avenue, S.E., Washington, D.C. 20032

DEPARTMENT OF PHYSICAL MEDICINE AND REHABILITATION

Alfred P. Pavot, M.D., Director

Clinical Consultation: Ralph E. Riley
46 WM

Initial Evaluation: April 23, 1970

Referred by: Dr. Herbert A. Wisotsky

Chief Complaint:

(1) Pain and stiffness in the neck.

(2) Pain and numbness in both upper limbs of about one years duration.

History of the Present Illness:

This 46 year old, white, male patient who has been working as a sheet metal worker most of his life states that he fell off a scaffold in May, 1969 injuring the left side of his back. As he states, he had a tumor in the left upper back, which apparently was aggravated by the fall and rapidly enlarged in size and became quite painful. This eventually necessitated surgical excision in September, 1969. The post operative course was un-eventful and he went back to work eventually.

He states, however, that about the same time, that is shortly after this accident, he began to experience pain and stiffness in the neck and also began to note that he would frequently wake up and find the fingers in his right hand being asleep. He would have to shake his hand several times before regaining normal sensation. Within the next few weeks, the left hand became similarly involved.

With the passage of time, these symptoms became more and more frequent and got to the stage where several times during the day he could feel his fingers falling asleep.

On March 21, 1970, while painting at home, he again fell off a ladder and since then has had a marked exacerabation of all his symptoms.

He consulted, at that time, his family physician, Dr. Wisotsky, who prescribed local heat and an over-the-door cervical traction device which the patient has used with slight symptomatic relief.

Past History:

This patient states that at the age of 18 while he was in the horse Marines, he fell off a horse and was dragged by the horse for about a half a mile.

He was never involved in any car accident.

Physical Examination:

This is a 46 year old, white, male patient, who looks several years younger than his age. He does not appear to be in acute distress. He is mentally clear and cooperative and relates his story well.

Pulse, 80, regular in rhythmn and force, volume good. Blood pressure 130/80.

Examination of the neck reveals his left shoulder to be held at a slightly lower level than the right. He has a transverse incision scar measuring approximately 3 inches over the left scapula with dimpling and depression of the muscle manifest at that level.

Palpation of the neck reveals tenderness over the spinous processes of C-4, C-5 and to a lessor [sic] extent C-6.

The range of motion of the cervical spine is mildly limited due to pain. This is particularly so in extension and lateral flexion.

There is localized tenderness over the incision scar area.

Placing the trapezii muscles under strain, particularly the upper and middle fibers causes pain and more so on the left side than the right side.

Neurological examination of the upper limbs reveals no selective motor deficit. The reflexes are symmetrical and are two plus bilaterally.

On examination for sensation, there is a relative hypoesthesia over the index and middle fingers of the right hand.

On testing the trapezii muscles, there is some weakness demonstrated in the left trapezius muscle particularly in the middle fingers.

X-Rays of the cervical spine show arthritic changes with boney spur formation between C-4 and C-5 and C-5 and C-6. There seems to be some encroachment on the intervertebral neuroforamina at the level of C-4, C-5 and to a lessor extent C-5, C-6.

Diagnosis:

(1) Degenerative arthritis of the cervical spine.

(2) Probable cervical radiculitis.

(3) Left trapezius decompensation.

Recommendations:

This patient will be placed on a program of physical therapy consisting of application of hydrocollator packs to the neck and upper back, intermittent cervical traction, range of motion, active assistive, active and manual resis-

tive exercises for the muscles of the cervical spine, shoulder elevation and depression and postural training.

The patient will be treated three times a week for the next two weeks and will be re-evaluated at the end of this time.

Thank you for referring this interesting patient to us.

Yours sincerely,

/s/ Alfred P. Pavot
Alfred M. Pavot, M.D.

APP/sbr
4/30/70

WISOTSKY DEPOSITION EXHIBIT 2

WASHINGTON INTERNAL MEDICINE GROUP
a professional corporation

December 9, 1975

Herbert Wisotsky, M.D.
5418 Oxon Hill Road
Oxon Hill, Maryland

Re: *Mr. Ralph Eugene Riley*

Dear Doctor Wisotsky:

Many thanks for referring Mr. Ralph Riley to our office. Although there is no doubt that Mr. Riley has cervical osteoarthritis as manifested by his symptomatology and his x-rays, his neurological examination is within normal limits. The patient is obviously quite anxious and tense and this greatly contributes to his problem.

I would suggest that we continue cervical traction and give the patient a short course of phenylbutazone therapy.

In view of these episodes of loss of muscular control, I would suggest evaluation by a neurologist. However, I think his symptomatology may be hysterical in nature and ultimately neuropsychiatric consultation may be indicated.

Best personal regards.

Sincerely,

Raymond Scalettar, M.D., F.A.C.P.

RS:CAB

WISOTSKY DEPOSITION EXHIBIT 3

LEONARDO C. MAGUIGAD, M.D., P.A.

General and Forensic Psychiatry
5620 St. Barnabas Road, Suite 280
Marlow Heights, Maryland 20021

January 21, 1976

Herbert Wisotsky, M.D.
6188 Oxon Hill Rd.
Oxon Hill, Md.

RE: RILEY, Ralph E.

Dear Dr. Wisotsky:

Mr. Riley, a 51 year old married man was examined at my office on Dec. 15, 1975. He was accompanied by his wife. He brought with him medical discharge summary about his recent hospitalization at Physicians Memorial Hospital at La Plata Md.—11-20-75 to 11-25-75. He gives the history of recurrent anxiety episodes which has been increasing in frequency during the month of Dec. 1975. His last hospitalization seems to represent one of this attack where he had feelings of tightness across his chest like a "rope". He had coldness and sweating of his hands and felt like his "equilibrium was off". In describing his "nervous attack", he states that he begins shaking from his chest down to the foot after which he has "muscle cramps" and he is rendered incapacitated. This episodes apparently occurs suddenly and has no control over the same. He felt that his medical condition has been gradually deteriorating since 1969 and seems to feel that in the last few months he has been increasing by [sic] fearful of his safety particularly at work situation. He does have a strong family history of coronary morbidity and any discomfort that suggest [sic] or signify "heart attack" he easily gets stricken with fear that can escalate to panic state.

On mental status, examination he came appropriately dressed with neck collar on. He appeared moderately de-

pressed, was anxious and tight. He indicated that he increasingly have [sic] lost his confidence including driving a car. He has considerable fear about "heart attack" and truly his age and family history justifies excessive concern though it may also relate to pre-involutional state were susceptible individual have concerns about health state and bodily functions. His affect is one of anguished concern with lack of modulation and variability. Wife, who was on hand revealed that he is not as active as he use to and has lost considerbale ambition and zest in living. He exhibited no psychotic thoughts content nor bizarre behavior. He, however is obsessed and somatically preoccupied which can really impair his mental concentration to work; thus, incapacitated to effectively do his share of responsibility at work.

It is my considered opinion based on historical and clinical data that it may not be to the best interests of all concerned for him to continue working. I agree that he has RECURRENT ANXIETY EPISODES with underlying depression. I would be happy to follow this patient with you. There is a risk factor of going into deep depression if left INACTIVE enhancing only his sense of incapacitation and sense of futility. I would start him on SINEQUAN 10 mg. tid with TRANXENE 7.5 mg. one or 2 every 6 hours PRN for anxiety outburst.

Thank you for the privilege of treating with you this patient.

Very truly yours,

/s/ Leonardo C. Maguigad, M.D.
Leonardo C. Maguigad, M.D.

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Case No. 78-DCWC-82

OWCP No. 100376

In the matter of:

RALPH RILEY, *Claimant,*

vs.

FEDERAL SHEET METAL, *Employer,*

and

INSURANCE COMPANY OF NORTH AMERICA, *Carrier.*

La Plata, Maryland
Friday, May 19, 1978

DEPOSITION OF: GUILLERMO E. SANCHEZ, M.D.

called for oral examination by counsel for the Claimant in the office of Dr. Guillermo E. Sanchez, Charles Street, La Plata, Maryland, beginning at 12:55 P.M. on Friday, May 19, 1978, before Stephany L. Jerome, Notary Public for the State of Maryland, in and for Montgomery County, when were present:

ON BEHALF OF THE CLAIMANT:
ASHCRAFT, GEREL & KOONZ
By: JAMES F. GREEN, Esquire
2101 L Street, N. W., Suite 303
Washington, D. C. 20037

[2] ON BEHALF OF THE EMPLOYER AND CARRIER:
GALIHER, CLARKE, MARTELL & DONNELLY
By: RICHARD W. GALIHER, JR., Esquire
1215 - 19th Street, N.W.
Washington, D. C. 20036

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Examination on Behalf of:

Witness:	(Claimant) *Mr. Green*	(Employer and Carrier) *Mr. Galiher*
Guillermo E. Sanchez, M.D.	3	4
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Exhibits	*For Identification*
No. 1 Curriculum vitae	3
No. 2 Report of Dr. Sidhu	35

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[3] Thereupon,

Guillermo E. Sanchez, M.D.

having been duly sworn by the Notary Public, was examined upon his oath and testified as follows:

EXAMINATION ON BEHALF OF THE CLAIMANT

By Mr. Green:

Q. Doctor, if I could, would you state for the record your full name, sir, and professional address?

A. My full name is Guillermo E. Sanchez. My office is in La Plata on Charles Street, Post Office Box 387 and in Waldorf, Charles Professional Center, Waldorf, Maryland, 20601.

Q. Doctor, I believe for this deposition you prepared a curriculum vitae, is that correct sir?

A. Not for this deposition. I always have it on my own.

MR. GREEN: What I'm going to do is have that marked as Deposition Exhibit Number 1. Mr. Galiher has a copy of that and is reviewing it.

(Whereupon, the curriculum vitae was marked for identification as Claimant's Deposition Exhibit Number 1.)

By MR. GREEN:

Q. Now, Doctor, for purposes of your qualifications as an expert, do you practice in a particular specialty, sir?
A. Yes. My practice is limited to orthopedic surgery.

Q. And are you a Board Certified orthopedic surgeon?
A. I'm Board eligible, and I'm taking the certifying [4] examination in September of this year.

MR. GREEN: All right, sir. The rest of the curriculum vitae is clear. I would move that the doctor is able to express an opinion considered as an expert opinion for purposes of this deposition.

Do you have any questions?

EXAMINATION ON BEHALF OF THE EMPLOYER AND CARRIER

By MR. GALIHER:

Q. Doctor, have you ever taken those Boards before?
A. No.

Q. Do you speak Spanish fluently?
A. Yes. Better than English at least. I'm not sure.

MR. GALIHER: I have no other questions at this time.

MR. GREEN: Doctor, I think your English is fine. If you don't understand any questions that I might ask, you please don't hesitate to ask me to repeat them and I will.

FURTHER EXAMINATION ON BEHALF OF THE CLAIMANT

By Mr. Green:

Q. Doctor, did there come a time when you saw a man by the name of Ralph Riley in 1975?

A. Yes, sir.

Q. And could you tell us, Doctor, when is the first time you saw Mr. Riley in your professional capacity as an orthopedic surgeon?

[5] A. On which I was called in consultation on November 23rd, 1975. Mr. Riley had been admitted to the intensive unit at Physicians Memorial Hospital under the care of a cardiologist Dr. Harry L. Burke because the patient had presented in the emergency room with symptoms that were suggestive of a cardiac condition. After Dr. Burke did his thorough evaluation he found no indication of a heart problem causing the symptoms, and he thought the problem was related to a neck condition and that was the reason I was consulted.

So I saw him first November 23, 1975 and my history taken at that time at the hospital was as follows. Mr. Riley is a 51 year old male sheet metal worker who stated that he had problems with his neck since 1970. The initial onset was spontaneous and gradual with pain radiating through his shoulders and arms. And when he first consulted his physician he was told he had a cervical osteoarthritis and had an extensive plan of conservative treatment which included physical therapy and different kinds of anti-inflammatory agents, muscle relaxants and so forth, that gave him only partial relief of his symptoms.

The physical therapy was discontinued eventually because the patient states that gave him headaches. In regard to injuries he mentioned an injury in 1969 that he fell against a masonry wall, but at that time he remembers that the problem was related mainly to the left shoulder. He also

mentioned another injury while he was with the Marines. In a drill he fell [6] off a horse and was dragged for several miles, he says maybe a mile—I mean for several feet, maybe a mile.

In any event, since 1970 patient states that he had a flare-up that required medication, some of them very strong—Indocin. That is an anti-inflammatory agent. And his symptoms were mainly described as pains on the back of his neck going down both arms, but more towards the left, and at times going down to the tips of the fingers. They were increased by activity, coughing or sneezing. He had also tingling numbness sensation, mainly on the left side. And rotational movements—meaning from side to side—seemed to aggravate the symptoms.

In regard to the type of work, he stated that most of his work is overhead type and involves quite a bit of hyperextension of the neck. That means that most of his work he will have to do with his neck bending upwards.

We reviewed the records also that Dr. Burke had on the chart. Then we performed a physical examination. Found that he held his neck in a semiflexed position. That is tilted forward. He had a radial range of motion which by bending his neck he was able to come to two fingers—I mentioned here—from the sternal notch to the chin. And coming to straighten out his neck he was only able to come to the neutral position. He was unable to come further than that. He had a rotational movement angle of 30 degrees, about midway what's normal. The lateral bending from side to side was—I term it—slightly limited. [7] There was a tenderness to percussion and palpation of the spinous process—that is the little bumps on the back of the neck—from C-4 to C-7. His reflexes were equal. Well, he had a weakness of the power of grip tested only with the fingers. The sensation at that time to pinprick was within normal limits.

So after I finished the physical examination, we reviewed the x-ray that had already been ordered, and they revealed signs of osteoarthritis with a narrowing of the disc space from C-5 and C-6 and C-6 to C-7. And there appeared to be also encroachment of the foramina of C-5 and C-6. That means that there was a possibility that the nerve at those levels was under some kind of pressure.

My initial impression as far as diagnosis was that of osteoarthritis of the cervical spine with radiculopathy at C-6 and C-7, meaning compression of the nerve again at the C-6 and C-7 spaces. So at that time I recommended that he be put on an intermittent cervical traction. He was given Valium which is a sedative and muscle relaxant. And also that he take ultrasonic treatments and heat applications while in the hospital.

Q. Doctor, let me stop you for one second. Had Dr. Burke at that point released him from his cardiac care, do you know sir?

A. Yes. He felt that there was no indication of a heart condition. He had a check of the cardiogram, the cardiac signs and multiple laboratory examinations that did not support a [8] diagnosis of a heart condition.

Q. Fine, sir. If you could continue, what happened next?

A. Well, with these measures of treatment there was very little improvement, and he was unable to tolerate traction so we gave him a nerve block with Xylocaine.

Evidently at that time the patient decided to go back to his family physician, Dr. Wisotsky I think. And after discussing with Dr. Burke, we thought he could be released from the hospital and follow medical treatment on an outpatient basis.

Q. Doctor, did you then see Mr. Riley on an outpatient basis, sir?

A. Yes, sir. Then the first time he returned to my office was on December 19, 1975. So on that office visit was when

Mr. Riley first told me that there had been no relief on his neck pain. There was still radiation through the upper extremities, and it appeared to be no help from the medications either.

And then he mentioned that on November 19, 1975 he was working at Walter Reed Army Medical Center and he was moving duct work into position when he strained his neck. Now, he stated that he had pain right at the base of his neck. He was already taking medications, and he took some of his medication which gave him temporary relief.

MR. GALIHER: Doctor, excuse me.

[9] THE WITNESS: Yes, sir.

MR. GALIHER: Is this still part of the history that you received pertaining to the November 19, 1975 accident that you're detailing in this point in time?

THE WITNESS: I don't understand your question. What I gave is hospital history as it was given by the patient.

MR. GALIHER: Right, but when he came——

THE WITNESS: When he came on the 19th to the office, like I mentioned before, he told me that there was no relief from his symptoms, and was at that time when he explained to me that on the 19th of November while working at Walter Reed he strained his neck. And I'm giving the details that he stated that he was already on medication so he took some of what he had.

And then the symptoms became so severe with chest pain, that he was rushed to the emergency room in the hospital, and that it when he came under the care of Dr. Burke. And he also mentioned—Obviously the first thing I asked him was why you didn't tell me that when you were in the hospital, and he mentioned to me that with all the excitement about having an acute heart attack he forgot to mention either to me or Dr. Burke.

So that was the time that he mentioned that his problems had been aggravated or made worse while he was at work. So in that office visit on physical examination there [10] was still restricted motion. No drastic change from what was reported in the hospital, 30 degrees on rotation and tenderness on the same area. In addition he complained of stabbing pain going across the left shoulder and left arm. So he was referred to the physical therapist—we have a physical therapist in here—to continue the same plan of treatment that he had in the hospital.

He took five, six times and by then I advise him to take the treatments for three weeks, physical therapy, and then to return here in three weeks. Okay. That was on December 19.

Then I didn't see him again until May 12th, 1976 when he came back again. At that time the problem was related to acute onset of pain and swelling of the right elbow. That was diagnosed as olecranon bursitis. The elbow was full of fluid from the inflammation. This was injected and aspirated, and that sort of solved the problems with the elbow. And he was still having problems with his neck. His medications were refilled and he was advised to remain at rest. So that was for May 1976 which was the problem mainly related to the elbow.

Okay. Then he returned on May 21st, 1976. That was for treatment again of pain on his neck radiating to the left shoulder. There was very little change on the physical findings. And then he was started on Motrin which at that [11] time was a new medication which had just come out as a part of symptomatic treatment of arthritis. I think I have the prescriptions in here. Okay. Yes, that is the Motrin.

And since that time the visits became more regular. He was examined on June 8th, 1976. At that time was sort of a semi-emergency visit because patient states that he was just trying to mow the grass at home, started the lawn mower and acute pain on his neck developed that was much

more severe than usual. And again he was advised that there was no magic medication or magic cure for that, that he had to remain on limited activity and continue taking the Motrin which appeared to give him partial relief of the symptoms, or at least help to make it more bearable.

Prior [sic] to that he had another problem that required his readmission to the hospital. That was on March 30, 1977. That started after the lawn mower, I have to make a correction on that. At that time he was admitted to the hospital.

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[16] Q. Doctor, based on your treatment of Mr. Riley since 1975 and the history Mr. Riley did give you of the incident at work, Doctor, based on these facts I wonder if you have an opinion that you might be able to state with a degree of reasonable medical certainty as to whether or not the incident at work aggravated Mr. Riley's underlying arthritic condition?

A. Yes, I do. The injury that he describes working with bending and certain twist to the neck. I think that can be considered an aggravating factor, but obviously he had a long-standing pre-existing condition that makes his neck much more vulnerable to injury. I do not expect today a person who bends [17] his neck and has twisting at the neck would end up like him, but a person who has a long-standing arthritic condition and twists his neck would do it.

Q. Do you feel that Mr. Riley—an opinion based on a reasonable degree of medical certainty—is permanently disabled from his occupation as a sheet metal worker?

A. Yes. I would not recommend him to go back as a sheet metal worker.

Q. Doctor, Mr. Riley's testimony at the hearing in this matter is of a recollection of actually physically striking his neck as he climbed between two uneven sections of scaffolding, and the movement that you describe by way of a twisting or hyperextension of the neck took place appar-

ently, but Mr. Riley also suggests that he actually physically came in contact with a piece of duct work.

Would that factor in any way change your diagnosis, as to whether or not there was a striking to the neck, would that affect your diagnosis or your current impression at all?

MR. GALIHER: Objection.

THE WITNESS: No.

MR. GREEN: What are the grounds for the objection?

MR. GALIHER: He can go ahead and answer.

MR. GREEN: I would just like to get the grounds on the record because we're post-trial now.

MR. GALIHER: The question is objected to because I [18] don't think the characterization of Mr. Riley's testimony is completely accurate. It probably would be more accurate to read what the transcript is. And this doctor has no knowledge of a striking having occurred, so I'm not sure that he can be in a position to say what might have been his condition if such a striking had occurred or did not occur.

THE WITNESS: No. I don't think the diagnosis can be changed in this.

By MR. GREEN:

Q. You would not change. It would not affect——
A. No. No. I don't think so.

Q. Fine, Doctor. Doctor, based on your treatment of Mr. Riley for those past few years, do you believe that he has been cooperative with you with regard to his treatment and care?
A. Yes, sir.

Q. Doctor, do you believe that he has been forthright and honest with you during his treatment and care?

A. I think so.

MR. GREEN: I have nothing further. Thank you, Doctor.

MR. GALIHER: Doctor, can we take a five minute break while I take a look at the records that you have been referring to?

THE WITNESS: Yes.

* * * * * * * * * *

[20] Q. Now, Doctor, you have in your file numerous medical report forms that deal with hospitalization for Mr. Riley. As a matter of fact, when I observed them they were all clipped together in one pile. Can you refer to those a minute?

A. You mean those insurance forms?

Q. Yes. Here they are.

Okay. Now, I want to go through each date—These are attending physician's report that you and I are both looking at. When do they begin and when do they end, if you tell us that?

A. July 19, 1976, March 1976, January 10, '77 and 11/7, October 27, '77, September 13, '76, August 2, '77, June 14, '76, April 1, '77 and May 17, '77.

Q. Now, Doctor, are each of those reports that you rendered to Mr. Riley's union in connection with billing medical services and having them pay you?

A. Yes, that is to the union insurance.

Q. Doctor, there is a question on there at the top of it that says Question Number B, "Is condition due to injury or sickness arising out of patient's employment?" And reviewing your file, can you see if you ever gave an indication in those reports that the answer to that question was yes?

A. No. I don't have that noted, but we didn't do that because——

[21] Q. Well, wait a minute. The answer to the question is no?

A. No.

• • • • • • • • • •

Q. Doctor, it's clear from your testimony that during the initial hospital admission, and that was in November of 1975, Mr. Riley mentioned nothing to do about an injury at work.

A. No.

Q. Now, when you say no, you really mean that there was no mention of an injury at work, is that correct?

A. In the initial hospital consultation, yes, sir.

Q. Right, that's correct.

A. That's correct.

Q. Now, on how many occasions did you see Mr. Riley in the hospital in November of 75, was it just on one occasion or did you have follow-up visits to him while he was in the hospital?

A. Unfortunately I don't have a full copy here of the [22] hospital record, but he was seen more than once. But a thorough inquiry of the problem, you do it only on the first visit. You don't go to the patient every day and ask the whole story every day. And the following visit is to find out whether it's better or not. I don't need to go back through the whole thing, what the problem was.

Q. It's clear, however, that during that whole time during that hospitalization, at which time he saw you on more than one occasion, he indicated to you nothing about this injury at work?

A. Yes, sir.

• • • • • • • • • •

[23] Okay. Can you recall in November of 1975 or close to that time, from your notes or anything you can remember

about Mr. Riley's condition, what was the state of the arthritis in his neck at that time?

A. By x-rays you cannot say what is the state of the neck. What we look for on the x-rays and we can evaluate initially, wanted to know whether there's a fracture or dislocation or something new or something that happened at the time of the stated injury. And that by the x-rays did not show anything new. What he had in there is a degenerative process, long-standing process, involving narrowing of the disc spaces.

Q. Have you, in x-rays that you have taken after that time, noticed any change by x-rays in the condition of his neck as far as the arthritis?

A. There has been no drastic change. The arthritis has remained stationary.

Q. Now, Doctor, at the time you initially saw him at the hospital and made your examination, did you find any indication of a bruise or any other mark that you noted in your report to indicate that Mr. Riley had suffered a trauma to his neck?

A. No. There were no external signs of injury, but that [24] doesn't rule out the possibility of injury. You can have quite an injury without any bruises or swelling or anything of the like.

Q. Now, you indicated, essentially, in answer to Mr. Green's questions that your diagnosis would have been the same whether he told you he twisted his neck or whether he struck his neck, is that correct? Is that a fair statement?

A. Yes. The diagnosis was cervical arthritis or cervical radiculopathy.

Q. Is there any reason to suspect that a blow of the neck as opposed to a twisting of the neck would cause any different symptoms than you observed in Mr. Riley at the time of your initial examination?

MR. GREEN: Doctor, before you answer the question let me indicate a concern. By this line of questioning, Dick, are you accepting—Or I should put it this way. By this line are you removing your prior objection to my question to him?

MR. GALIHER: No.

MR. GREEN: Thank you, Doctor. Please go ahead.

THE WITNESS: Okay. Well, a blow and a twisting injury, most of the time they go together because if you receive a blow just by natural tendency or by reflex you have a tendency to go away from the blow.

By MR. GALIHER:

Well, we're talking about two things here. With the [25] motions that you're making of the head, was it your understanding that the type of injury that Mr. Riley suffered was an injury that caused his head to be stretched backwards or to be twisted to the side?

A. Twisted and backwards. Twisted actually.

Q. Is that the type of injury that he described to you, that it was twisted?

A. Well, I didn't go very much into the details of how he did it. He was——

Q. Well, I must ask you to be very exact on what you actually recall or what you actually have noted in your records as opposed to your opinion as to how this could have occurred.

A. No. I did not go much in to the details of how it occurred.

Q. Okay. So you don't know from your records and your recollection at this time whether Mr. Riley indicated that the motion of his neck was backwards and up or from side to side——

A. No. I don't have that information.

Q. When the injury occurred?
A. No.

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[27] Q. So that meant that as he described it to you that he had suffered neck pain on at least an off and on basis since 1970 which he described to you was due to the arthritis which had been discovered in 1970, is that correct?

A. Yes, but I don't think the symptoms were ever severe enough to require prolonged hospitalization or time loss of work or——

Q. How long was Mr. Riley in the hospital between the time you first examined him and the time that you discharged him?

A. Unfortunately we didn't request the hospital records, but I think it was between seven and ten days, but I cannot say that with certainty. That hospital record was under Dr. Burke's name and everything went to him. I only got a copy of my consultation.

Q. After Mr. Riley got out of the hospital initially, did his condition improve?

A. Initially did not improve, but over the course of the— Like when he was first examined after he was discharged a month later, he was about the same.

Q. And he still had the 30 percent restriction of motion that you have indicated in his neck?

A. Right.

Q. When, in your opinion, did his condition go from a temporary condition to a permanent condition in his neck as a result, in your opinion, of the aggravation that you have [28] described that he may have suffered in November of '75?

A. I don't think we can answer that question because I don't think we have finished with him. I cannot discharge him because I feel he still needs supervision, and, furthermore, the consultant I referred him to, he has suggested

that if the symptoms persist he may need a myelogram and further delineation of treatment depending upon that.

Q. Are his symptoms to his back which arose after this the primary problem at this time, or is it the neck?

A. It's the neck.

Q. Has Mr. Riley ever been in a neck collar?

A. Initially when he was in the hospital we tried, but that was of no significant help.

Q. Have you ever had occasion to have him in a collar since he was out of the hospital?

A. No. The neck collar for this type of problem offers very little help. Has to be a more dynamic type of treatment—traction, postural exercises.

Q. You have indicated in your testimony that you don't think that Mr. Riley could go back and do sheet metal work again, is that correct?

A. Yes.

Q. When did you first come to that conclusion that he could not go back and do that work?

A. Well, I have to explain this. I was under the impression [29] that he has retired, and I had never considered him, you know, on the basis of sending him back to work. But now, if I find out that he is a sheet metal worker, my answer is no, he cannot go back. But I have never given it consideration because—when are you going to be going back, because I thought he has retired.

• • • • • • • • • • •

[30] Q. Do you feel that Mr. Riley, except for his neck, is in good physical condition for a man of his age?

A. His general health I would consider satisfactory.

Q. And according to Dr. Sidhu's report Mr. Riley has actually been in the hospital—in Physicians Memorial Hospital in May of 1976, at least to the emergency room, where he had nerve blocks in his neck, is that correct?

A. Yes, sir. That was—Let's see. That record may be with Dr. Burke.

Q. It's May '76.
A. May '76?

Q. Right. According to Dr. Sidhu's report, severe neck pain, nerve blocks and so forth.
A. That might have been perhaps '77.

Q. Then Dr. Sidhu refers in the next paragraph of his report to March '77 reports. Now, did you have occasion in your [31] records—and I probably can help you find them—to find instances where Mr. Riley would be doing something and he would hurt his back or hurt his neck causing additional neck symptoms to him? Could you refer to your records?
A. I remember the lawn mower incident that you had mentioned before, but I don't remember his mentioning any—You mean one time in December he came back from New York after a trip and he mentioned that his neck was acting up again? He lifted two small logs to put on the fire once during the winter and that gave him pain, but I don't consider that anything like additional injury.

Q. That was in where?
A. December 13. The winter of 1977, lifted two small logs.

Q. There's also an incident there, Doctor, about lifting some grocery bags. Can you find that?
A. Yes. Lifting grocery bags I wouldn't consider, either, something to make a new case out of that, you know, lifting grocery bags is almost a part of normal life, and if that aggravates the pain, I wouldn't consider that a new problem, but I don't remember having—I don't remember seeing that.

• • • • • • • • • • •

[32] Q. And what activities do you feel he can do and what activities do you feel that he cannot do due to the injury to his neck?

A. I will bar him from heavy lifting. I mean no more than 25 pounds.

Q. Is this due to the neck or the back?

A. To the neck.

Q. You're restricting this to the neck?

A. He should be restricted to anything that is going to require overhead work or lifting, getting into awkward positions, prolonged standing or prolonged walking. But as far as doing light-type of work, desk-type of work, clerical work, I think he is qualified to do that.

Q. Most recently you had given him physical therapy. Within the last three months would it be?

A. That's right.

Q. And was that because of increase of his symptoms that necessitated that?

A. Yes.

Q. Was there any particular reason why his symptoms increased at that time that he described to you?

[33] A. Let me see. He was referred to the therapist recently, was last December '77 was the last. Let's see. On December '77 that is when he had come back from a trip to New York and his neck had become increasingly painful. That was the only thing I can remember.

Q. Okay. And because of increase in symptoms, that is why you referred him for physical therapy.

A. Right.

• • • • • • • • • •

[35] Q. And this report is dated July 25, 1977 with a cover letter of July 26th, 1977 to you, and I would appreciate you, Doctor—I'd like to have that marked as Claim-

ant's 2 for the deposition. Doctor, I would appreciate it if you could find your original of that.

A. Of that report?

Q. Yes, sir.

(Whereupon, the report from Dr. Sidhu was marked for identification as Claimant's Deposition Exhibit Number 2.)

By Mr. Green:

Q. Doctor, I would appreciate it if you could for the purposes of this record if you would read the first full paragraph.

A. This 53 year old male patient was seen in the office on July 25, 1977. The patient gives a history that he has had what he describes as cervical arthritis since 1970 and has been treated by Dr. Wisotsky and Dr. Pavot at Cafritz Hospital. He was put on physical therapy and medications including Indocin. At that time he was having intermittent pain and stiffness of his neck. On November 19, 1975 he was at work and was doing sheet metal duct work at Walter Reed Hospital when he struck his neck and shoulder on the steel duct. He started having severe pain [36] in his neck and also pain in his anterior chest and radiating into the left arm. He was admitted to Physicians Memorial Hospital to the intensive care unit because it was felt that he might have had a heart attack. However, he was investigated and was found not to have had a heart attack. He was seen by Dr. Sanchez at that time. In addition he was seen by Dr. Burke and was treated with cervical traction, bed rest and medications.

Q. Doctor, let me stop you at that point. Would Dr. Sidhu have gotten that history from you or from Mr. Riley or from the both of you?

A. From the patient.

• • • • • • • • • •

[38]

CERTIFICATE OF SHORTHAND REPORTER—NOTARY PUBLIC

I, Stephany L. Jerome, the officer before whom the foregoing deposition was taken, do hereby certify that the witness, Guillermo E. Sanchez, M. D., was duly sworn by me; that the testimony of said witness was taken by me stenographically and thereafter reduced to typewriting by me; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to this litigation and have no interest, financial or otherwise, in the outcome of this matter.

In witness whereof, I have hereunto set my hand and affixed my notarial seal this 26th day of May 1978.

Notary Public in and for
Montgomery County, Maryland

My commission expires
July 1, 1978.

SANCHEZ' DEPOSITION EXHIBIT 2

RAJINDAR S. SIDHU, M.D., P.A.
4710 Auth Place, Suite 510
Camp Springs, Maryland 20023

July 26, 1977

Guillermo Sanchez, M.D.
Charles Professional Building
Waldorf, Maryland 20601

Re: Ralph E. Riley

Dear Dr. Sanchez:

Enclosed please find a copy of my office consultation notes on Ralph E. Riley dated July 25, 1977.

Thank you for this referral.

Sincerely,

/s/ RAJINDAR S. SIDHU
Rajindar S. Sidhu, M.D.

RSS:mkb
Enc.

RAJINDAR S. SIDHU, M.D., P.A.
4710 Auth Place, Suite 510
Camp Springs, Maryland 20023

July 25, 1977

RALPH E. RILEY:

This 53 years old, male patient was seen in the office on July 25, 1977.

The patient gives a history that he has had what he describes as cervical arthritis since 1970 and has been treated by Dr. Wisotsky and Dr. Pavot at Cafritz Hospital. He was put on physical therapy and medications including Indocin. At that time he was having intermittent pain and stiffness of his neck. On November 19, 1975 he was at work and was doing sheet metal duct work at Walter Reed Hospital when he struct [sic] his neck and shoulder on the steel duct. He started having severe pain in his neck and also pain in his anterior chest and radiating into the left arm. He was admitted to Physician's Memorial Hospital to the intensive care unit because it was felt that he might have had heart attack. However, he was investigated and was found not to have had a heart attack. He was seen by Dr. Sanchez at that time. In addition, he was seen by Dr. Burke and was treated with cervical traction, bedrest and medications. He was also put on physical therapy. He had x-rays of his neck taken and the patient was told that he had osteoarthritis of his neck. He was continued on Indocin and Valium. In January 1976 he started having what he described as palsies and shaking attacks and this was treated with Valium. He still has these attacks off and on.

In May 1976 he had very severe neck pain and pain in his shoulders and he went to the emergency room of Physician's Memorial Hospital and was seen by Dr. Sanchez and he had nerve blocks done in his neck. With this he showed improvement. He was also put on Motrin in addition to Valium at this time.

In March 1977 he had severe low back pain with spasms and he was admitted to Physician's Memorial Hospital again and stayed in pelvic traction for about 9 days and continued physical therapy as an outpatient for 3 weeks. With this his back pain improved markedly. He continues to have neck pain off and on which is aggravated by any exertion and when this happens he feels his neck swells up and gets a lump in the left side of the back of the neck. In addition he has pain going down to the anterior chest bilaterally and pain also goes into his shoulders and arms with intermittent numbness in his hands and fingers. In addition he has quivering feeling in his muscles mostly in the triceps especially on the left side.

In addition to this he has complained of intermittent severe headaches, mostly in the back of the head and mostly on the left. These pains are also aggravated by humidity and any exertion. He also feels that his grip is weak, especially on the left side. At this time he does not have any low back pain but he does have some soreness in his right hip.

In the past history, he had surgery for pilonidal cyst in 1956 and also had what he described as bursitic tumor removed from the left shoulder in September 1969. He also has had malaria and jaundice when he was in the service. He was told that he had high blood pressure and was treated for several months but at this time he is on a diet because of his hypercholesterolemia. He has a strong family history of heart attacks and his father had diabetes. He said that he is allergic to penicillin.

At the present time he takes Motrin about 3 tablets a day and Valium PRN. He also takes Tylenol No. 3 and requires 3 or 4 pills every day.

X-rays of the cervical spine done at PMH have been reported to show degenerative changes at C5-6 and C6-7 with foramina encroachment. There is also minimal degenerative spurring of L4 lumbar vertebral body. I have not had an opportunity to review his x-rays.

On examination, examination of the head is unremarkable. Examination of the neck shows decreased range of motion, especially flexion extension but much more so he has difficulty with rotation to the left side. Examination of the lower back is unremarkable except for some decrease of range of motion. Straight leg raising is 90° bilaterally.

On neurological examination, his cranial nerves are normal. He has slight weakness of the left biceps and triceps. Sensory examination shows slight decrease of touch and pain sensation in both hands except for the thumb and extending up to the medial forearm up to the elbow. This would correspond to C6 and C7 dermatomes. Deep tendon reflexes are symmetrical except for the triceps jerks which are slightly decreased especially on the left side. Reflexes in the lower extremities are hyperactive. His plantars are flexed bilaterally. His coordination is normal.

The patient obviously has cervical degenerative arthritic disease with degeneration of the discs at C5-6 and C6-7 with evidence of mild radiculopathy, and perhaps early myelopathy. At this time the patient seems to be quite comfortable so I would continue to treat him conservatively but I discussed with him that he might require myelography and surgery if his symptoms get worse or he continues to have exacerbations of his symptoms. I have not given him a return appointment but told him to avoid any strenuous activity especially anything which strains his neck then he could keep his condition under good control. Furthermore he had history of pain and swelling of his other joints which suggests generalized arthritis, perhaps rheumatoid arthritis which should be investigated and treated medically. He will go back to see Dr. Sanchez for conservative management. If he has exacerbations or worsening of his condition then he should be admitted to the hospital for myelography and further treatment.

/s/ Rajindar S. Sidhu
Rajindar S. Sidhu, M.D.

RSS:mkb

Supreme Court, U. S.
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DEC 8 1980
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No. 80-518

In the Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor for Special Litigation

JOSEPH M. WOODWARD
JOSHUA T. GILLELAN II
Attorneys
Department of Labor
Washington, D.C. 20210

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the presumption set forth in Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, that a claim for compensation comes within the provisions of the Act, applies to the statutory requirement that a worker's injury arise "out of and in the course of" his employment.

2. Whether, in the circumstances of this case, the employer can overcome the Section 20(a) presumption by evidence that a particular employment-related accident did not occur.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-11a) is reported at 627 F.2d 455. The opinion of the Benefits Review Board (Pet. App. 12a-18a) is reported at 9 B.R.B.S. 936. The opinion of the administrative law judge (Pet. App. 19a-26a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1980. A petition for rehearing was denied on July 3, 1980 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Ralph Riley worked as a sheet metal worker for 32 years. He had been employed by petitioner U.S. Industries for some three weeks when he awoke in the early morning hours of November 20, 1975, with acute pain in his arms and chest. Riley was hospitalized immediately for treatment of a suspected heart attack, but the hospital subsequently determined that his pain resulted from an acute exacerbation of cervical osteoarthritis, from which he had suffered recurrently since 1970, and a hiatal hernia (Pet. App. 12a-13a). It is undisputed that, since that hospitalization, Riley has been permanently and totally disabled from employment.

Riley filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. 901 *et seq.*, as extended to private employment in the District of Columbia

by Section 1 of the District of Columbia Workmen's Compensation Act, D.C. Code Ann. § 36-501 (1973). At a hearing before an administrative law judge, Riley testified that late on the afternoon of November 19, 1975, the day preceding his hospitalization, he had accidentally hit his neck and shoulders on an overhead duct and had felt a sharp pain in the back of his head, in his arms, and in his chest. Riley's close friend, Howard Sutherland, corroborated his testimony (Pet. App. 13a, 20a-21a). The administrative law judge, crediting disputed evidence that Riley had not reported the accident to his treating physicians or his employer until a considerable time after his hospitalization, concluded that Riley and Sutherland had fabricated the story of the accident and that no such incident had occurred. Without further discussion of the cause of the worsening of Riley's symptoms, the administrative law judge denied his claim (Pet. App. 19a-26a).

Riley appealed to the Benefits Review Board, which affirmed by a two-to-one vote. The Board majority concluded that the administrative law judge's finding that the alleged accident had not occurred had a reasonable basis in the record (Pet. App. 12a-16a). Board Member Miller dissented on the ground that "the real issue in this case is not whether claimant sustained an accident at work but whether claimant's injury is causally related to his employment" (*id.* at 17a-18a). Member Miller reasoned that because the administrative law judge incorrectly focused his attention exclusively on whether the claimant had sustained a particular accident, his decision contained no analysis or findings as to whether the employer had presented sufficient evidence to rebut the presumption contained in Section

20(a) of the Act that the claim comes within the provisions of the Act (*id.* at 18a).[1] Accordingly, he would have remanded the case to the administrative law judge for further findings (*ibid.*).

The claimant filed a petition for review of the Benefits Review Board's decision in the court of appeals, and the Director, Office of Workers' Compensation Programs, intervened in support of his position. The court of appeals reversed the Board's decision and remanded for further proceedings (Pet. App. 3a-11a). The court did not question the administrative law judge's finding that the alleged accident had not occurred. It held instead that "the injuries suffered by the claimant [the sudden exacerbation of his arthritic neck condition] might nevertheless have been 'employment-bred' " and that the claimant was entitled, by virtue of Section 20(a) of the Act, 33 U.S.C. 920(a), to the rebuttable presumption that they were (Pet. App. 10a). Because the administrative law judge had focused exclusively on the occurrence of the alleged accident, however, he had not made the necessary findings. Accordingly, the court remanded the case for further consideration, without "anticipat[ing] what these findings will be" (*id.* at 11a).

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[1] Section 20(a) of the Act, 33 U.S.C. 920(a), provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this chapter.

ARGUMENT

The decision of the court of appeals did not finally dispose of the claim in this case, but merely remanded it for additional findings that may or may not result in an award of compensation. Should the remand result in denial of the claim, petitioners will have no need of relief from this Court. Should the remand result in an award of compensation in reliance on the Section 20(a) presumption as construed by the court of appeals (and should the award be affirmed by that court), petitioners may renew their contentions here. There is, accordingly, no reason for this Court to depart from its usual practice of declining to review nonfinal orders of courts of appeals. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893).

Review is, in any event, unwarranted because, as we show below, the court of appeals' decision correctly reflects the language and purpose of the Section 20(a) presumption and is consistent with the law now in effect in all circuits in which the presumption issue has been considered.

1. Section 20(a) of the Act, 33 U.S.C. 920(a), provides a broad rebuttable presumption that a claim for compensation "comes within the provisions of [the Act]." Petitioners contend (Pet. 7-14) that the court of appeals erred in holding (Pet. App. 10a) that "where a claimant has been injured, the Act requires that, in the absence of substantial evidence to the contrary, a claimant be given the benefit of a rebuttable presumption that the injury arose out of

and in the course of the claimant's employment." [2] Petitioners further contend (Pet. 7-11) that this holding is contrary to the rule followed in the Seventh, Fifth, Fourth, and Second Circuits. The cases on which petitioners rely for the asserted conflict, however, have been superseded in each circuit by more recent decisions applying the presumption to the relationship between a claimant's injury and his employment.

Thus, petitioners rely primarily on the Seventh Circuit's decision in *Eschbach* v. *Contractors, Pacific Naval Air Bases*, 181 F.2d 860 (1950), holding the presumption inapplicable to the question whether the claimant's tuberculosis arose out of his employment. But more recently the Seventh Circuit has ruled otherwise, citing Section 20(a) and holding that "where there is a doubtful factual question as to whether an injury arises out of employment, the law presumes compensability." *Continental Ins.*

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[2] In this holding the court of appeals is obviously using the terms "injured" and "injury" in the layman's sense of those terms, *i.e.* in the sense of the term "injury" as it occurs within the Act's definition of "injury" in Section 2(2), 33 U.S.C. 902(2). That section, in pertinent part, provides: "The term 'injury' means accidental *injury* or death arising out of and in the course of employment * * *" (emphasis added). The court noted (Pet. App. 8a) that the evidence was "undisputed" that claimant suffered an injury in the form of a sudden exacerbation of his arthritic neck condition, so severe as to require hospitalization; and it further explained (*id.* at 10a n.3) that because the case therefore did not present the issue "whether the statutory presumption of compensability applies not only to the fact of causality, but also to the fact of injury," it had no occasion "to address this question." Unless otherwise stated we use the term in the layman's sense, *i.e.* without reference to the employment nexus requirement.

Co. v. *Byrne*, 471 F.2d 257, 260 (7th Cir.), cert. denied, 406 U.S. 918 (1972).[3]

The cases from the Fourth and Fifth Circuits on which petitioners rely merely contain dicta suggesting that the Section 20(a) presumption does not apply to the relationship between a claimant's injury and his employment. *Furlong* v. *O'Hearne*, 144 F. Supp. 266, 271 (D. Md. 1956), aff'd, 240 F.2d 958 (4th Cir. 1957); *Young & Co.* v. *Shea*, 397 F.2d 185, 188 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969). In any event, those circuits have, in more recent cases, applied the presumption to the relationship between employment and the injury or disabling condition. See *Newport News Shipbuilding & Dry Dock Co.* v. *Director, O.W.C.P.*, 583 F.2d 1273, 1281 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979); *Eller & Co.* v. *Golden*, 620 F.2d 71, 73 (5th Cir. 1980).

Petitioners' contention (Pet. 10-11) that a contrary rule exists in the Second Circuit is also unfounded. That court's statement in *Gooding* v. *Willard*, 209 F.2d 913, 916 (2d Cir. 1954), that "[w]e might let the decision turn on the above, but it should also be noted that the burden to show that the accident was a contributing cause of the death was on the [claimant,]" was obviously dictum. In any event, the Second Circuit subsequently has taken a different view.

---

[3] See also *American National Red Cross* v. *Hagen*, 327 F.2d 559 (7th Cir. 1964). The Seventh Circuit there held that "the ruling applied in *Travelers Ins. Co.* v. *Donovan* [221 F.2d 886, 888 (D.C. Cir. 1955)] is controlling" (327 F.2d at 561), and it described that holding as follows: "'[A]bsent substantial evidence to the contrary, a disability occurring in the course of employment must be presumed to have arisen therefrom'" (*id.* at 560, quoting *Travelers Ins. Co.* v. *Donovan*, *supra*, 221 F.2d at 888).

In *John W. McGrath Corp.* v. *Hughes*, 264 F.2d 314, 317 (2d Cir.), cert. denied, 360 U.S. 931 (1959), the court recognized that the Section 20(a) presumption could apply to show that a claimant's disability and subsequent death arose out of his employment, although it found, on the record before it, that the employer had offered sufficient evidence to rebut the presumption.

In addition to the decisions cited above, the Third, Eighth and Ninth Circuits, the only other courts of appeals to have considered the question, have also held the presumption applicable to the requirement that the claimant's injury or disabling condition arise out of his employment. *Marra Bros.* v. *Cardillo*, 154 F.2d 357, 359 (3d Cir. 1946); *Ridgley* v. *Ceres, Inc.*, 594 F.2d 1175, 1177 (8th Cir. 1979); *Parsons Corp.* v. *Director, O.W.C.P.*, 619 F.2d 38, 40-41 (9th Cir. 1980). These decisions are consistent with the plain language of the Section 20(a) presumption, as well as with "the humanitarian nature of the Act," which this Court has held the presumption exemplifies. *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362-363 (1965). See also *id.* at 361, stating that the presumption applies to limit the scope of judicial review of an administrative finding that a particular injury arose out of and in the course of employment.

2. Petitioners also contend (Pet. 17-21) that, assuming the Section 20(a) presumption applies, the court of appeals nevertheless erred in failing to find that it was rebutted by substantial evidence. This contention essentially rests on the erroneous argument (Pet. 18-20) that in failing to make such a finding the court of appeals usurped the administrative fact-finding function on this question.

Nothing in the court of appeals' opinion provides any basis for this argument.[4] The court did not disturb the administrative finding that the accident to which Riley had testified did not occur, *i.e.* that his injury did not occur "as alleged" (Pet. App. 24a). Rather, it held that the exclusive focus of the administrative law judge and the majority of the Benefits Review Board on the evidence regarding the accident was too narrow. The administrative finding against Riley on that question, although valid, was an insufficient basis for rejecting his claim, because it did not resolve the broader question whether his injury was precipitated or aggravated by the ordinary conditions of his employment as a sheet metal worker (Pet. App. 10a-11a).

Thus, far from reweighing the evidence, the court of appeals simply ruled that the administrative law judge "did not make all the findings necessary for a proper disposition of [the] claim" (Pet. App. 11a). Accordingly, the court remanded the case so the agency could make the necessary findings, noting that "[w]e cannot anticipate what these findings will be" (*ibid.*).

---

[4] Nor does the court of appeals' decision have the effect, ascribed to it by petitioners (Pet. 14-16), of making the Longshoremen's Act "general health insurance covering anything that goes wrong in the human frame" (Pet. 14). Petitioners' suggestion that Riley's condition is not compensable because it is a result of the "daily hazards involved in ordinary living" (Pet. 14) is not foreclosed by the court's decision and may be presented to the administrative law judge on remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor
for Special Litigation

JOSEPH M. WOODWARD
JOSHUA T. GILLELAN II
Attorneys
Department of Labor

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No. 80-518

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Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

RICHARD W. GALIHER, JR.
1215 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8330
Attorney for Petitioners

Of Counsel:

GALIHER, CLARKE, MARTELL
& DONNELLY
1215 Nineteenth Street, N.W.
Washington, D.C. 20036

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

1. Whether the Court of Appeals erred in finding that the Administrative Law Judge should have applied the statutory presumption to whether the Respondent Riley's condition arose out of his employment where substantial evidence has shown that no injury occurred "in the course of" that employment in the first place.

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No. 80-518

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL.
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITIONERS' REPLY BRIEF

ARGUMENT

1. The Federal Respondent contends that the Decision of the Court of Appeals did not "finally" dispose of the claim in this case so there is "no reason for this Court to depart from its usual practice of declining to review non-final Orders of Courts of Appeals." (Opposition p.4). The Petitioners' contend, however, that the ruling by the Court of Appeals with respect to the statutory presumption is "fundamental to the further conduct of the case." *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-54, 85 S.Ct. 308, 310, 13 L.Ed.2d 199, 204. Accordingly, Petitioners' contend that

this Court should pass on a pure question of law and thus avoid the "danger of denying justice by delay." *Westcott* v. *Impresas Armadores, S.A. Panama*, 564 F.2d 875, 880-881.

The Federal Respondent also contends that review is "unwarranted" because the Court of Appeals Decision "correctly reflects the . . . purpose of the Section 20(a) presumption and is consistent with the law now in effect in all circuits in which the presumption issue has been considered." (Opposition Brief p.4). Contrary to the Federal Respondent's contention, the cases cited by that Respondent do not indicate that Petitioners' cases have been superseded or reversed in any manner, and do not apply to the factual situation in *Riley*. The decisions cited by the Federal Respondent show only that in later cases the statutory presumption has been *applied* in various decisions in those circuits. Of interest is the fact that in all decisions cited by the Federal Respondent, the question of whether or not there was an injury "*in the course of*" employment was not considered as an issue.

In *Continental Insurance Co.* v. *Byrne*, 471 F.2d 257, 260 (7th Cir.), *cert. denied* 406 U.S. 918 (1972), there was no question about whether or not the claimant longshoreman fell to the bottom of number-one hold suffering substantial injuries. *Id.* at 258. In the Fourth Circuit Opinion of *Newport News Shipbuilding and Drydock Co.* v. *Director, OWCP*, 583 F.2d 1273, 1281 (4th Cir.), *cert. denied* 440 U.S. 915 (1979), the claimant had testified that his symptoms did not predate his employment or exist at the time of his pre-employment physical. There was "no dispute" that his respiratory difficulties became symptomatic only after he was exposed to welding smoke at work. *Id.* at 1281. In *Eller and Co.* v. *Golden*, 620 F.2d 71 (5th Cir. 1980), there was no dispute that the claimant longshoreman on April 11, 1974, was struck from behind by a fork lift truck and in-

jured. *Id.* at 72. In the 8th Circuit Decision of *Ridgely* v. *Ceres, Inc.*, 594 F.2d 1175 (1979), there was no dispute that the claimant was injured on July 10, 1970 in the course of his employment as a longshoreman. *Id.* at 1177.

All of the foregoing cases are similar in that the fact that the injury suffered by the claimant occurred *in the course of employment was undisputed.* The only question in those cases was one of causal relationship between the injury and the disabling condition.

In *John W. McGrath* v. *Hughes*, 264 F.2d 314 (2d Cir.), *cert. denied* 360 U.S. 931 (1959), the Court found that the §20(a) presumption should be applied to a causal relationship situation, that is whether the injury "arose out of the employment." Factually, there was no dispute in the history given to physicians or by the widow that the claimant's symptoms occurred when he was "pulling a rope to help move a barge around the pier." (*Id.* at 316). The language of this Decision seems to support the Petitioners' position herein that the claimant must prove "injury" and is not aided in this instance by the presumption. This is contrary to the Federal Respondent's view of how the presumption applied in the case. In that case, the Second Circuit talked about "sufficient proof" offered to rebut the §920 evidence. The Court cited this Court's Opinion in *Del Vecchio* v. *Bowers*, 1935, 296 U.S. 280, 286, 56 S.Ct. 190, 193, 80 L.Ed. 229, wherein this Court stated about the presumption that:

> [I]ts only office is to control the result where there is an entire lack of competent evidence.

The presumption was used to apply to the causal relationship between the claimant's death at home and his alleged exertion on the job while hauling in a line and moving the barge.

The Third Circuit Opinion in *Marra Brothers* v. *Cardillo*, 154 F.2d 357, (3rd Cir. 1946), involved no dispute concerning whether the longshoreman was working or in the course of his employment. The Court found that the presumption applied to the death of the claimant who was injured "upon navigable waters of the United States." *Id.* at 359.

In the Ninth Circuit case of *Parsons Corp.* v. *Director, OWCP*, 619 F.2d 38 (1980), the Court of Appeals was deciding a case under the Defense Base Act, 55 Stat. 622, 42 U.S.C. 1651. In this Decision there was no dispute concerning whether or not the claimant was in the course of his employment when he discovered his occupational disease. The issue once again involved causalty, and the presumption was held applicable. The case of *O'Keefe* v. *Smith Hinchman and Grills Associates, Inc.*, 380 U.S. 359 (1965) also involved the Defense Base Act. The employer therein considered all of its employees to be "in the course of regular occupation from the time they leave the United States until their return." *Id.* 13 L.Ed. 896. Once again, the only question in this case was whether or not the injury "arose out of" employment. It should further be noted that cases involving the Defense Base Act, while incorporating the statutory provisions and benefits of the Longshoremen and Harbor Workers Act, do not generally involve any issue involving whether or not claimant was "in the scope of" his employment, since they are covered under the Act in the course of regular occupation "from the time they leave the United States until their return." It should also be noted that the Defense Base Act was involved in this Court's determination in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 1951, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483.

All of the above cases cited by the Federal Respondent (as well as this decision being appealed from, in-

volving the Respondent Riley) confirm that there is conflict with the Seventh Circuit concerning the applicability of the statutory presumption to the issue of causal relationship, which the Circuit found "inapplicable" to the claimant's injury in *Eschbach* v. *Contractors Pacific Navy Air Bases*, 181 F.2d 860 (1950). The more recent cases show that once the facts indicate that the claimant's injury occurred in the course of his employment, that the statutory presumption applies to causally relate the injury occurring during the course of that employment and the claimant's disability or death. Prior to *Riley* there have been *no cases* which have applied the statutory presumption in the *first instance* to determine that the claimant's injury occurred "in the course of" his employment, thus requiring consideration of the §920 presumption to relate that course of employment to the claimant's disability. In order to rely on the statutory presumption the District of Columbia Circuit first factually decided that Riley's injury occurred "in the course of employment." Having so found, contrary to the Administrative Law Judges finding on this issue, then the Court finds that the causal relationship presumption should have been applied because in their opinion Riley's injury was "employment-bred" (Pet. App. 10a). The Court's opinion thus can be interpreted to read out of the definition of "injury" under the Act (33 USC 920 [2]) the requirement that the injury occur "in the course of employment." This constitutes reversible error since the statute by its terms requires that the injury must be one "arising out of *and* in the course of employment." 33 USC 902(2). As stated in *John W. McGrath Company* v. *Hughes, supra:*

> "But we must still be satisfied that there was sufficient evidence for the Deputy Commissioner properly to find that the alleged incident *truly happened*

> arising out of and in the course of employment, 33 USCA §920(2) . . . " (Emphasis supplied)

It should be noted that in *Riley* there was substantial dispute concerning whether or not an injury had occurred to the Respondent Riley in the course of his employment. After full trial on this issue, the Administrative Law Judge stated that the §20 presumption was "inapplicable to the happening of an accident." (Pet. App. 24a). What the Administrative Law Judge meant is that the statutory presumption does not apply to Riley's "injury" since he found no injury occurred to Riley while "in the course of employment" with the Petitioner, Federal Sheet Metal.

The above cases make the conclusion of the Judge that the claimant sustained "no injury within the meaning of Section 2(2) of the Act on November 19, 1975", and the Court of Appeals' affirmance of that determination most significant.

The Federal Respondent cites the Seventh Circuit decision of *Continental Insurance* v. *Byrne, supra* for authority that the §20(a) presumption (Opposition p. 4) can apply to causally related disability and death, thus ruling "otherwise" than it previously ruled in *Eshbach Contractors, supra.* However, in *Continental Insurance* the Court stated that prior to the operation of the presumption there must be "a doubtful factual question." More specifically the Court stated as follows:

> "We begin with the proposition that where there is a doubtful factual question as to whether an injury arises out of employment, the law presumes compensibility." (*Id.*, p. 260).

Judge Gershuny in his opinion denying benefits to Riley stated as follows:

> "The record, in my judgment, is free of doubt and permits no other findings as to the credibility of Claimant and Sutherland." (Pet. App. 24a)

The decision in *Continental Insurance* thus would not require the use of the presumption in *Riley* until a "doubtful factual question" arises concerning whether an injury "arises out of employment." The Administrative Law Judge in *Riley* stated that he had "no doubt." The decision in *Continental Insurance* is therefore distinguishable from *Eschbach*, supra.

The Federal Respondent also asserts that the language of the Fourth Circuit in *Furlong* v. *O'Hearne*, 144 F.Supp. 266, 271 (D. Md. 1956), aff'd, 240 F.2d 958 (4th Cir. 1957), the language of the Fifth Circuit in *Young & Co.* v. *Shea*, 397 F.2d 185, 188 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969) and the Second Circuit language in *Gooding* v. *Willard*, 209 F.2d 913, 916 (2d Cir. 1954) constitute dicta rather than the holding of the case in each of those cases. The question whether the presumption applies to the fact of injury is central to those cases and crucial to the finding of the Court of Appeals in *Riley*.

Petitioners' assert that the Federal Respondent's Brief in Opposition supports the Petitioners' contention that a Writ of Certiori to the United States Court of Appeals for the District of Columbia Circuit should be granted in this case. *Riley* is the first reported case where a Court of Appeals has mandated that the presumption of Section 920(a) should be applied not only to injury "arising out of" employment, but also to injury "in the course of" employment. Under the Longshoremen and Harbor Workers Act, the term injury involves both "arising out of *and* in the course of employment." It is asserted that the Court of Appeals usurped the function of the Administrative Law Judge in finding "injury" without a finding that it arose "in the scope of" the claimant's employment. Under the Court of Appeals Decision as it now stands, the District of Columbia Circuit has found an *irrebutable* presumption that the injury

which Riley suffered, occurred in the scope of his employment because he had medical treatment. Upon remand, the Court of Appeals has only asked for further hearing to determine whether or not the injury "arose out of" the claimant's employment. Although the aforementioned issue has been central to this case from the beginning, it is most interesting to note that both the Federal Respondent and the Court of Appeals have ignored this issue. Both Federal Respondent and the Court of Appeals state in footnotes that the *Riley* definition of "injury" does not apply to the "fact of injury." (Opposition Brief p. 5 n. 2 and Pet. App. 10a n. 3). The Federal Respondent states that the Court of Appeals is "obviously using the terms 'injured' and 'injury' in the *layman's* sense of those terms." (Emphasis supplied). The Petitioners' assert that the term should be used and interpreted in its *legal* sense. It is this question presented once again to this Court, which is "fundamental to the further conduct of the case."

2. The Federal Respondent also contends in opposition that upon remand the Petitioners' can present evidence and therefore *are* not "foreclosed" by the Court's decision from argument that the presumption does not apply. (Opposition p. 8 n. 4). While the Court stated that they "cannot anticipate what these findings will be," the Petitioners' assert that the decision of the Court of Appeals forecloses the essential question presented by appeal, concerning whether the Court's application of the presumption makes all "injuries" to be "in the course of employment" by *irrebutable* presumption of law. Upon remand, the Court of Appeals requires review for substantial evidence to rebut the presumption for causalty under §20a but not the "fact of injury." This Petition for Writ of Certiorari seeks definition of the statutory term "injury" with respect to whether there was substantial evidence in the record to

apply the statutory presumption to Riley's injury when the Administrative Law Judge and fact-finder found *no* injury. Upon remand the Administrative Law Judge is to decide now whether Riley's injury was precipitated or aggravated by the ordinary conditions of his employment as a sheet metal worker (Pet. App. 10a-11a) and to consider the applicability of the presumption of causal relationship as applied to the facts of this case. There was no contention previously made by the Respondent Riley or his attorney before the Administrative Law Judge or the Benefits Review Board that "conditions of employment" caused aggravation of the Respondent's arthritis. Petitioners' contend that it is irreversible error to apply the causal relationship presumption to whether Riley's condition arose out of his employment where substantial evidence has shown that no injury occurred "in the course of" that employment in the first place. Petitioners' contend that this case should not be retried on this new issue.

CONCLUSION

Upon consideration of the Brief and Authorities by the Federal Respondent, it is obvious to the Petitioners' that the Federal Respondent has fallen into the same trap which the Court of Appeals did in dealing with application of the statutory presumption under §920(a) of the Act. Statutory presumptions are now part of the Workers' Compensation Laws of the many states. See 3 Larson, *The Law of Workmens' Compensation*, Section 80.33. Before the presumption of work-related injury applies, however, it is clear under the decisions, including the Federal decisions cited by both Petitioners' and Federal Respondent, that a worker's injury must occur in the course of employment *before* the statutory

presumption applies to presume that the injury "arises out of employment." The Court of Appeals in its opinion stated that "no decision of this Court has ever failed to apply the presumption to any facet of any claim before it." (Pet. App. 9a-10a). This was the Court of Appeals' error; to apply the presumption where the Administrative Law Judge in his findings found that no injury, as defined by the statute, ever occurred. By finding that "the statutory presumption is not limited to the inference of a work-related incident from the injury . . ." (Pet. App. 10a), the Court of Appeals has ignored all established precedents in rewriting this Worker's Compensation statute to require only that the injury "arise out" of employment but not occur "in the course of" employment. Petitioners' assert that if the scope of this statute is to be changed, it should be done by Act of Congress not by the District of Columbia Circuit.

The Petition for Writ of Certiorari should be granted.

RICHARD W. GALIHER, JR.
1215 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8330

Attorney for Petitioners

Of Counsel:

GALIHER, CLARKE, MARTELL
& DONNELLY
1215 Nineteenth Street, N.W.
Washington, D.C. 20036

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No. 80-518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC.,
and
INSURANCE COMPANY OF NORTH AMERICA, *Petitioners,*
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
and
RALPH RILEY, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF PETITIONERS, U.S. INDUSTRIES/ FEDERAL SHEET METAL, INC., AND INSURANCE COMPANY OF NORTH AMERICA

RICHARD W. GALIHER, JR.
Counsel of Record
GALIHER, CLARKE, MARTELL & DONNELLY
1215 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8330
Counsel for Petitioner

Of Counsel:
RICHARD W. GALIHER
WILLIAM H. CLARKE
FRANK J. MARTELL
WILLIAM J. DONNELLY, JR.
GALIHER, CLARKE, MARTELL & DONNELLY

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether there is any statutory requirement under the Longshoremen's and Harbor Workers' Compensation Act for a claimant to prove the occurrence of an "accidental injury arising out of and in the course of employment" (33 U.S.C. 902(2)).

2. Whether the statutory presumption, under 33 U.S.C. 920(a), applies to the term "in the course of" as well as "arising out of".

3. Whether the statutory presumption, under 33 U.S.C. 920(a), should be applied when there was substantial evidence of record before the Court below to rebut the presumption, and affirm the findings of the Administrative Law Judge and Benefits Review Board.

STATEMENT PURSUANT TO RULE 28.1

1. Pursuant to Rule 28.1 of this Court's Rules, Petitioner U.S. Industries/Federal Sheet Metal, Inc., attaches hereto, as Appendix A to this brief, a listing, naming all of its parent companies, subsidiaries, and affiliates.

2. Pursuant to Rule 28.1 of this Court's Rules, Petitioner Insurance Company of North America states that it is a wholly-owned subsidiary of INA Financial Corporation, which is a wholly-owned subsidiary of INA Corporation. Insurance Company of North America's subsidiaries and affiliates are: Compagnie d'Assurances Colina, S.A. (Ivory Coast), Compagnie Financiere INA (France); Compagnie Nouvelle d'Assurances (France); INA International Investors Ltd., (Pennsylvania); La Nouvelle, S.A. (France); Paine Webber Incorporated (Delaware), and its 68 subsidiaries and affiliates; and Societe Civile Immobiliere Turina (France). Attached hereto, as Appendix B to this brief, is a listing naming all of its parent companies, subsidiaries, and affiliates.

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BRIEF FOR PETITIONERS

OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals, denying the Petition for Rehearing, is unreported and reproduced as Appendix A to the Petition for Certiorari. The opinion of the Court of Appeals, denying Suggestion for Rehearing En Banc, is also unreported and reproduced as Appendix B to the Petition for Certiorari. The Court of Appeals' decision is reported at 627 F.2d 455 (1980), 11 BRBS 298 and reproduced in its entirety at Appendix C to the Petition for Certiorari. The decision of the Benefits Review Board is reported at 9 BRBS 936, and is reproduced in its entirety as Appendix D to the Petition for Certiorari. The decision of the United States Department of Labor, Administrative Law Judge, is unreported

and reproduced in its entirety as Appendix E to the Petition for Certiorari.

JURISDICTION

The decision of the Court of Appeals was entered on May 22, 1980. The order of the Court of Appeals denying the Petitions for Rehearing and for Suggesting Rehearing En Banc was entered on July 3, 1980. The order allowing Certiorari was filed on March 9, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

District of Columbia Code:

§36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.

The provisions of chapter 18 of title 33 U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

United States Code, Title 33:

§902. *Definitions*

When used in this chapter —

* * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * *

§903. *Coverage*

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury. . . .

* * *

§920. *Presumption*

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary —

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

March 4, 1927, c.509, §20, 44 Stat.1124

§921. *Review of Compensation Order*

* * *

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occured, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. . . .

* * *

STATEMENT OF THE CASE

This Petition arises out of a claim by Respondent Ralph Riley ("Riley") for workers' compensation benefits from U.S. Industries/Federal Sheet Metal, Inc. ("U.S. Industries"), and their workers' compensation insurer, The Insurance Company of North America ("INA"), pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, as extended by the District of Columbia Workers' Compensation Act ("Act")[1]

[1] Act of March 4, 1927, c.509, 44 Stat. 1124, as amended, 33 U.S.C. 901 *et seq.* (1967), made applicable to the District of Columbia by the Act of May 17, 1928, c.612 §§1, 2, 45 Stat. 600, as amended, D.C. Code §§36-501, 36-502 (1963).

On November 20, 1975, Riley awoke at home about 2:30 a.m. with tightness in his chest and pain in both arms, and neck (J.A.[2] 26). He was taken by his wife to Physicians' Memorial ("LaPlata") Hospital, about thirteen miles away, where he was examined and admitted (J.A. 26; Respondents' Ex.C R. 103; J.A. 89-99) until November 25, 1975 (J.A. 97). No history of injury on the job was given by either Riley or his wife to any of the physicians who treated him in the hospital, which included cardiologist, Dr. Henry Burke, and Dr. Alvaro Sanchez, an orthopedist. Initially, he had been admitted to the Coronary Care Unit of the hospital to rule out myocardial infarction (J.A. 96, 98) but, by the time of discharge, the diagnosis was cervical arthritis, and he was thereafter referred for further care to his private physician, Dr. Herbert Wisotsky (J.A. 44, 99).

Dr. Wisotsky had been treating Riley for arthritis since 1970 (J.A. 131). At that time, he sent Riley to Cafritz Hospital, Washington, D.C., where x-rays confirmed arthritic changes (J.A. 128-129). Since May 1975, Riley had been again under Dr. Wisotsky's active care for arthritis when he had been "off-work" because of neck, shoulder, and arm pains (J.A. 134). Prior to November 1975, Dr. Wisotsky had discussed retirement with Riley because of his cervical arthritis (J.A. 139, 142), and prescribed medication to him for treatment of the arthritis. Dr. Wisotsky did not see Riley in the hospital in November, but saw him in his office on December 1, 1975 for "anxiety" (J.A. 134). There was no mention at all to Dr. Wisotsky, on this first visit since July, of a job-related injury causing the November hospitalization (J.A. 135). Dr. Wisotsky saw him again on December 5, and then referred him to

[2] "J.A." references are to the Joint Appendix filed herein.

rheumatologist, Dr. Scalettar, and psychiatrist, Dr. Maguigad, who also examined him in December (J.A. 151-153). There was again no mention by Riley to Drs. Scalettar and Maguigad of any on-the-job occurrence or incident of increased arthritic pain (J.A. 151-153).

On December 16, 1975, Riley retained counsel (J.A. 32). On December 19, 1975, Riley saw Dr. Sanchez, and told him that he "forgot" to mention that he had "strained" his neck while moving duct work at Walter Reed Hospital on November 19, 1975 (J.A. 160). Nothing had been stated to Dr. Sanchez previously about an alleged injury at work (J.A. 165). On December 29, 1975, Riley's retained counsel filed a claim for workers' compensation with the United States Department of Labor (Claimant's Ex. 2, R.73; J.A. 34, 80-81). On this claim form, Riley alleged that an "accident" occurred while "lifting duct work weighing approximately 500 pounds and felt a sharp pain in neck". On July 16, 1976, he also filled out a claim for INA, asserting he had "struck his neck and shoulders on duct work" (Respondents' Ex. B, R.100; J.A. 86-87).

Prior to November 20, 1975, Riley had been employed by U.S. Industries at Walter Reed Hospital in the District of Columbia for approximately three weeks (J.A. 12, 21). He had been working there with his friend of fourteen years, Howard Sutherland, with whom he regularly commuted to and from work. Prior to this employment, both men had been off work and on unemployment compensation for six months, after working three and one-half years at Chalk Point Power Plant in Maryland (J.A. 13). Mr. Sutherland testified he first learned of Riley's hospital admission from Mrs. Riley, who called him at 5:30 to 6:00 o'clock in the morning on November 20, advising him of Riley's hospitalization

(J.A. 11). Mr. Sutherland testified he went to the job site that day and reported that Riley was in the hospital with chest, arm, and neck pains (J.A. 11). The employer received no report of job-related injury to Riley from its foreman, John Fury, (R. 216), but Fury was aware, three or four days later from Sutherland, that Riley was hurt and it was a heart attack. (J.A. 77).

When the case was tried before an Administrative Law Judge, Riley and his fellow employee, Sutherland, testified that an "injury" had happened while at work on November 19, 1975. However, the Administrative Law Judge rejected the claim, finding, as a fact, that Riley had failed to prove an accidental injury under 33 U.S.C. §902(2), and that he and Sutherland had given false testimony concerning the happening of an "accident" (see Pet. App. E). This decision of the Administrative Law Judge was affirmed by the Benefits Review Board with a dissent (see Pet. App. D). Riley petitioned for review, pursuant to 33 U.S.C. §921(c), to the United States Court of Appeals for the District of Columbia. On appeal, the Director, Office of Workers' Compensation Programs, intervened and adopted the dissent of Judge Miller of the Benefits Review Board. The Court of Appeals reversed the Benefits Review Board, holding that, under the facts of this case, there is a presumption that an "accidental injury" had occurred, and the Administrative Law Judge's decision was contrary to law because he failed to apply the presumption in Riley's claim (see Pet. App. C). The Court below held that because Riley had awakened in pain on November 20, 1975, he suffered an "injury" and that by requiring Riley to prove an accident did, in fact, occur, the Administrative Law Judge denied the claimant benefit of

that presumption. The Court further found that the Administrative Law Judge and Benefits Review Board had relied upon a "narrower statutory presumption" than required by the statute and vacated the decision of the Benefits Review Board and remanded "for full consideration of Petitioner's claim in light of this opinion". (J.A. 11) The Court made no comment or finding as to whether or not the evidence produced in the case was "substantial evidence" to rebut the presumption.

SUMMARY OF ARGUMENT

Petitioners, U.S. Industries, et al., assert that the clear terms of the statute require that compensation shall be awarded for "accidental injuries arising out of and in the course of employment".[3] Riley asserted that his disability occurred when he suffered a traumatic accident causing aggravation of his underlying cervical arthritis, and that this "accident" and "injury" occurred at work on November 19, 1975. The Administrative Law Judge hearing the case found, as a fact, that no such incident at work ever occurred, and that Riley and his co-employee gave false testimony concerning the happening of an accident on that date. The Administrative Law Judge also stated that the statutory presumption under 33 U.S.C. §920(a) did not apply to assist the claimant in proving the disputed fact as to whether or not an accidental injury, arising out of and in the course of employmet, had occurred.

The Court below did not decide whether the decision of the Administrative Law Judge was based on

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[3] It may also be awarded for occupational disease "arising out of employment" but there is no statutory requirement in the occupational disease portion of the definition that the disease occur "in the course of" employment. 33 U.S.C. §902(2). The opinion in *Riley* did not involve the definition or interpretation of "occupational disease."

substantial evidence, but U.S. Industries asserts that it was. Instead, the Court erroneously determined that the "agency's underlying standards are not in accord with law". The Court further held that the Administrative Law Judge had denied Riley the statutory presumption that his injury "arose out of and in the course of employment" on November 20, 1975, when he awoke at home at 2:30 in the morning, and went to the hospital for treatment of chest pain.

U.S. Industries urges that the effect of the Court's decision is to make Riley's home life part of his work environment, so that Riley's "injury", when he awoke at 2:30 in the morning, would trigger a presumption of work-relatedness and its rebuttal by U.S. Industries.

U.S. Industries asserts that the strained reasoning of the Court, is an unwarranted extension of the definition of injury under this Act, to make all conditions of life arising during non-work times and in non-work places, *prima facie* compensable. Such interpretation of the Act is contrary to legislative history, and the interpretation given to the words "out of" by this Act and the workers' compensation law of the state of New York, from which this Act was borrowed. U.S. Industries contends that the Court's findings eliminate the requirement of the statute that the employee prove an "accidental injury" arising "in the course of employment", before it can be presumed to occur "arising out of the employment". U.S. Industries asserts that, if the "accidental injury" did not occur in the course of employment, no presumption applies, and sufficient proof must be presented by the claimant that the accident "arose out of" employment.

ARGUMENT

I

Riley Sustained No "Injury" Within The Meaning Of The Statute

When the case was tried before the Administrative Law Judge, Riley claimed a traumatic injury "arising out of and in the course of employment" on the afternoon of November 19, 1975, when he was allegedly injured in the course of his employment with U.S. Industries. (R. 6) He testified that on that date he struck his neck against duct work on the job. (J.A. 22) After hearing all the evidence, the Administrative Law Judge concluded that Riley "sustained no injury within the meaning of Section 2(2) of the Act on November 19, 1975", as alleged, and that Riley and Sutherland gave false testimony as to the happening of an accident. (Pet. App. 24a) This finding was affirmed on appeal by the Benefits Review Board, but reversed by the Court below.

This Petition seeks review of the Court of Appeals' finding that Riley "suffered an injury" when he awakened in pain on November 20, 1975. (Pet. App. 7a) A review of the decisions of the Administrative Law Judge, Benefits Review Board and Court of Appeals in *Riley*, indicates that this finding was never previously made nor raised, briefed or argued by the parties and, accordingly, should not have been raised by the Court. See *Hormel* v. *Helvering*, 312 U.S. 552 (1941); *Smith* v. *American Guild of Variety Artists*, 368 F.2d 511, 514 (1966). This legal and factual error by the Court is not cured by a remand, since the Court of Appeals is, by virtue of its decision, granting a "new trial" to Riley where there was no mistake of fact on the part of the Administrative Law Judge in framing the issues tried before him.

The Court of Appeals noted that the Administrative Law Judge focused on the accident which allegedly occurred on November 19, 1975, but then states that the Judge's finding that no accident, in fact, occurred is not responsive to the issue "properly presented for resolution". (Pet. App. 10a) It can only be concluded, from the foregoing language of the Court of Appeals, that the issue was "not responsive" to the question which the Court of Appeals wanted to review. Even though the Administrative Law Judge found that Riley "sustained no injury within the meaning of Section 2(2) of the Act" on November 19, 1975, the Court erroneously decided that the Administrative Law Judge focused on the accident which allegedly occurred on November 19, 1975, and instead should have focused on the "injury" which it found "when he awakened in pain on November 20, 1975". (Pet. App. 7a) Concluding, the Court stated:

> "Even if the asserted work-related incident had never occurred, the injuries suffered by the claimant might nevertheless have been employment-bred." (Pet. App. 10a)

Having then resolved all the factual and legal issues in favor of Riley's claim, the Court of Appeals then summed-up its findings by stating:

> "Because the Administrative Law Judge and the Benefits Review Board relied upon a statutory presumption narrower than that elaborated here, the agency did not make all the findings necessary for a proper disposition of petitioners' claim. We cannot anticipate what these findings will be. See *Vendemia* v. *Cristaldi*, 221 F.2d 103, 106 (D.C. Cir. 1955)." (Pet. App. 11a)

The Court of Appeals thus disposed of the matter on a ground not raised by Riley or the Federal Respondent before the Administrative Law Judge, or before the Benefits Review Board.

Because Riley was hospitalized during the early morning hours of November 20, 1975, the Court found that Riley suffered an "'injury' as that term has been heretofor construed under the Act". (Pet. App. 8a) U.S. Industries assert herein that the Court's finding that Riley suffered an "injury" when he awoke early in the morning with chest pain *at home*, is contrary to the specific definition of "injury" as defined in the Act, and as meant by the Administrative Law Judge, when he made his finding that the claimant sustained "no injury within the meaning of Section 2(2) of the Act on November 19, 1975". (Pet. App. 24a)

Under the Act, "injury" is defined as follows:

§902. Definitions

When used in this chapter —

* * *

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * *

The Court of Appeals, in its decision, focused only on the term "accidental injury arising out of and in the course of employment", and not "occupational disease", as it is defined or interpreted under the Act. (Pet. App. 7a) The origin of this statutory definition of injury is found in the New York Act.[4] Historically, "in-

[4] Report #1190, 69th Congress, lst Session, H.R. 12063, p.1 (1926). See also, hearing before the Senate Judiciary Committee, 69th Congress, lst Session, S. 3170, pp. 31-32 (1926).

jury", to be covered under a workers' compensation act, had to be caused by an "accident". The requirement that the injury be accidental in character has been adopted either legislatively or judicially, by all but eight states. A. Larson, *Workmen's Compensation Law*, Vol. 1B, §37.10, p. 7-1. The original British term was "by accident", and occurs in the statutes of twenty-seven states. Ten other states, including this Act herein, use the term "accidental injury". The term "accidental injury", as used in the Act, means any unexpected misfortune or mischance resulting in some form of bodily injury. The term "accidental" in compensation statutes, is used in its popular and ordinary sense, and includes an unexpected personal injury resulting to a worker in the course of employment from any unexpected occurrence. *Fidelity & Casualty Company of New York* v. *Burris*, 59 F.2d 1042, 1044 (1932).

The requirement that an accidental injury "arise out of and in the course of employment" occurs in the statutes of thirty states, including New York and the District of Columbia. A Larson, *Workmen's Compensation Law*, Vol. 4, App. A, Table 2, pp. 511-523. However, the terms "arising out of and in the course of" appear in forty-two states. A. Larson, *Workmen's Compensation Law*, Vol. 1, §6.10, p. 3-1.

It is settled, under the Act and as a matter of compensation law generally, that the statutory terms "arising out of" and "in the course of", establish a two-prong test, both elements of which must be met to establish entitlement to compensation. The "arising out of" portion refers to a causal connection or relationship between the injury and the conditions of the employment. The "in the course of" portion refers to the time, place, and circumstances of the accident in relation to the employ-

ment. See A. Larson, *Workmen's Compensation Law*, Vol. 1 §6.10, p. 3-2, (1978), *Ward & Gow* v. *Krinsky*, 259 U.S. 503 (1922), *Cudahy Packing Co.* V. *Parramore*, 263 U.S. 418 (1923); *Ayers* v. *Hoage*, 63 F.2d 364 (1933).

Cudahy Packing Co. v. *Parramore*, 263 U.S. 418 (1923), involved interpretation and construction of these terms under the Utah worker's compensation statute. The Utah Act provided Compensation for personal injury or death of an employee by an accident "arising out of *or* in the course of his employment". (Emphasis added.) After this decision, during Congressional hearings on Bill S. 3170, there was discussion concerning the definition of injury, and the fact that the word "accident" was entirely eliminated from the proposed statute. (*Senate Hearings*, page 54.) However, during hearings before the Committee of the Judiciary of the House of Representatives concerning their proposed Bill, H.R. 9498 (Serial 16, pp. 1-120), O.G. Brown, representing the Council of American Shipbuilders, Inc., and the New York and New Jersey Dry Dock Association, gave testimony concerning agreed changes from the Senate Bill, S. 3170, to change the word "injury" to "accidental injury" and, instead of the disjunctive "or" being used, the Senate Bill would now read "arising out of *and* in the course of employment" (emphasis added), which, Mr. Brown noted, "corresponds with the New York law and most of the other state laws". (*House Hearings*, p. 71.) Neither of the original Bills, S. 3170 or H.R. 9498, passed. However, an amended Bill, incorporating the changes proposed by O.G. Brown, was proposed in Congress the following year and did pass. (See H.R. Rep. 1767, 69th Cong. 2d Sess. S. 3170 (1927).)

This Court's first opportunity to decide a case under the Longshoremen's and Harbor Workers' Compensation Act came in 1932 in the case of *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408 (1932). This case did not deal with the interpretation of "accidental injury" under the Act, nor the definitions of "arising out of" and "in the course of". However, in its decision, this Court stated that the Act:

> ". . . requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and death occuring *in the course of their work*, whether with or without fault attributable to employers." (Emphasis mine). 284 U.S. 414

Because *Riley* presents a question concerning whether the claim for injury is within the Act, the statutory language of the Act must be reviewed. *United States* v. *Charles*, 397 F.2d 712, 714 (1968). There is no question that Riley was an employee of an employer "carrying on employment in the District of Columbia" on his last work date of November 19, 1975.[5] The question is one of coverage, that is, whether Riley suffered an "accidental injury arising out of and in the course of employment". The decision concerning jurisdiction under the Act is with the Deputy Commissioner or Administrative Law Judge. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506-507 (1951).

Jurisdiction under the Act only applies when the relation of master and servant exists. *Crowell* v. *Benson*, 285 U.S. 22 (1932). This means that there must be an employer-employee relationship at the time of injury. In short, the employee must be in the scope of employ-

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[5] Act of May 17, 1928, c.612, §§1, 2, 45 Stat. 600, as amended, D.C. Code 36-501 (1963).

ment. As a general rule, employment may be said to begin when the employee reaches the entrance to the employer's premises where the work is to be done. *Bountiful Brick Co.* v. *Giles,* 276 U.S. 158 (1920). In *Foster* v. *Massey,* 407 F.2d 343, 347 (1968), the D.C. Circuit discussed when a person is "employed" as follows:

> "Generally a person on salary is not considered to be in the course of 'employment' 24 hours a day; rather the employment begins when he reports for work and ends when he leaves his work situs. A person working regularly on a five-day week is "not unemployed two days a week, but at the same time he is not in the course of employment in this statutory sense during those two days. A person who works for a daily wage is not 'employed' when he has no work or fails to go to work." 407 F.2d 347

By his own testimony, Riley's employment with this employer ended at 3:30 p.m. on November 19, 1975. (J.A. 26) Since this testimony indicates that Riley was *not* in the scope of his employment when he experienced pain at 2:30 in the morning when asleep at home (J.A. 26), there is no work-related situs of injury and one of the essential elements of the statutory definition of injury cannot factually be met herein.[6] In fact, when Riley

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[6] U.S. Industries distinguishes the cases of *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), and *O'Keefe* v. *Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (1965), which deal with coverage under the Defense Bases Act, 42 U.S.C.A. §1651-1654; *O'Keefe* v. *Pan American World Airways, Inc.*, 338 F.2d 319, 325-326 (5th Cir. 1964). There has also never been a contention by Riley or the Court of Appeals that his work or his home constituted a "zone of special danger" out of which his injury arose. *Director, OWCP* v. *Brandt Airflex Corp.*, _____F.2d _____(Nos. 78-2309, 2314, 2315, February 26, 1981).

suffered symptoms at home on November 20, 1975, he was:

> ". . . so thoroughly disconnected from the service of his employer, that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 507(1951).

Therefore, the Court below should have affirmed the findings of the Administrative Law Judge and the Benefits Review Board. *Norton* v. *Warner Co.*, 321 U.S. 565, 568 (1944).

It was the exclusive duty of the Administrative Law Judge, not the Court below, to determine the credibility of the witnesses, to interpret and evaluate the evidence and to draw inferences therefrom. *Banks* v. *Chicago Grain Trimmers Association,* 390 U.S. 459 (1968). Statutory definitions must control the meaning of statutory words, and although this is a humanitarian Act, which is to be liberally construed, that does not give the Court of Appeals authority to rewrite the Act or retry the case, *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197, 200 (1952).

In order to avoid the statutory definition of "injury", as construed by the Administrative Law Judge, the Court of Appeals invoked a new definition for the "injury" which happened on November 20, 1975 when Riley awoke in pain at home. (Pet. App. 7a) The Court of Appeals uses the term "employment-bred". Before *Riley,* this term had been used only once before, under the Act, in the case of *Vozzolo* v. *Britton,* 377 F.2d 144 (1967). *Vozzolo* involved a truck mechanic who suffered an injury on March 12, 1958 in the course of his employment, when a transmission fell on his chest. The

strain to lift the transmission from his body produced a heart attack, from which he was totally disabled for approximately four months. Vozzolo returned to work, and worked from May 18, 1958 until March 18, 1963, when he left the job again suffering from a second heart attack. The issue in that case concerned whether the claimant had sustained a new and distinct accidental injury in 1963. The Court said:

> "Sequential events originating naturally in an employment accident, and contributing without intervention of an independent cause to an incapacitating injury establish adequately the nexus required. Here, unlike situations where compensation was sought for a condition completely divorced from the incipient injury, the causal chain from accident to disability is clear and complete." 377 F.2d 149 (1967)

The Court noted the issue in the case to be whether the second heart attack (infarct), like the first, resulted from "an employment-bred aggravation of the employee's arteriosclerotic condition". The Court observed that there was no specific event as a catalyst for the 1963 infarction, however, it stated that it was "causally related to an event transpiring in the course of employment and, therefore, it was unnecessary for the employee to demonstrate that it was additionally brought on by some new job-connected occurrence". The Court, therefore, found that the 1963 infarction was a continuum of the original work-connected aggravation of symptoms which occurred in 1958, and was thus compensable. The language "employment-bred" constituted *dicta* in *Vozzolo,* because the Court correctly decided that, factually and medically, the 1963 infarction was a progression of the disease which had been previously aggravated by the compensable heart attack in 1958. Fac-

tually, in *Riley,* there was no contention or claim by Riley, that his arthritic condition since 1970 was employment-related and, therefore, *Vozzolo,* as precedent for the Court, was misapplied when it concluded that Riley's present condition may be "employment-bred" and, thereby, circumvented the clear-cut statutory definition of injury.

The Court of Appeals also cited, as authority for reaching its result, its decision in *Swinton* v. *Kelly,* 554 F.2d 1075, *cert. denied* 429 U.S. 820 (1976), asserting that an injury "need not have occurred during working hours in order to be compensable". *Swinton* is inapposite to the Court's interpretation of "injury" because there, the claimant had, in fact, suffered an injury "in the course of his employment". There was:

> ". . . no dispute as to the occurrence of the accident or the fact that any injuries associated with it arose out of and in the course of Swinton's employment. The focal issue was the extent of Swinton's injuries; specifically, "whether his back problem was causally related to the mishap on the truck." 554 F.2d 1082 (1976)

The Court of Appeals also relied upon *Butler* v. *District Parking Management Co.,* 363 F.2d 682 (1966) for the proposition that "an injury need not be traceable to any particular work-related incident to be compensable". (Pet. App. 9a) However, factually in that case, although the claimant did not suffer a mental breakdown on the job, he did become ill "during his working hours". 363 F.2d 683 (1966). Both Dr. Wisotsky and Dr. Sanchez testified that Riley's condition was related to an alleged incident ("accident") at work on November *19,* 1975 (J.A. 129 and J.A. 162), which the Administrative Law Judge found, as a fact, never occurred. Their opinions

on causality and whether Riley's preexisting arthritic condition was aggravated by a job-related injury, carry no weight on the issue of causation. *Miller* v. *O'Hearne,* 181 F.Supp. 105, 108 (D.C. Md. 1960).

The Court of Appeals correctly noted the rule of law that, in those cases where there has been no question concerning the occurrence of an injury *in the course of employment,* it will be presumed that the injury "arose out of employment". However, Riley was not in the course of employment on November 20, 1975 at 2:30 a.m., yet the Court's decision has erroneously placed Riley in the course of his employment while at home in bed. In contradiction, this same Court previously stated:

> "The Act does not, and never was intended to provide automatic insurance for every industrial accident. It was intended to pass along to industry the cost of alleviating injurious results which arise out of the employment of an injured claimant. Broadly and liberally interpreting the purpose and plan of the Act, as we are bound to do when the facts will so permit, equally, we are duty-bound to deny relief unless the injury 'arose " 'out of' the employment." *Evening Star Newspaper Co.* v. *Kemp,* 533 F.2d 1224, 1234 (1976).

To affirm the lower Court's finding that Riley's injury, suffered at home at 2:30 in the morning on November 20, 1975, was compensable (Pet. App. 10a), is to make all employers absolute insurers of the health of their employees for conditions arising on and off the job, twenty-four hours a day, and any aggravation of same which may be medically related to the physical effort of the occupation. See *Grain Handling Co.* v. *Sweeney,* 102 F.2d 464, 465 (2d Cir. 1939).

II

The Fact Of "Injury" Is Not To Be Presumed Under The Act. The Section 20(a) Presumption Does Not Apply To Help Riley Prove That His Injury Occurred In The Course Of His Employment.

The Court of Appeals reversed the Board and Administrative Law Judge because the Court erroneously determined that the presumption should have been applied on the facts to find that an "accidental injury . . . arising out of and in the course of employment" did occur, not on November 19 as Riley claimed, but on November 20, while he was home in bed.

The statutory presumptions under this Act are found in Section 20 of the Act (33 U.S.C. 920), and read in pertinent part as follows:

> "§920. Presumption
>
> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary —
>
> (a) That the claim comes within the provisions of this chapter.
>
> (b) That sufficient notice of such claim has been given.
>
> (c) That the injury was not occasioned solely by the intoxication of the injured employee.
>
> (d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

March 4, 1927, c.509 §20, 44 Stat. 1124.

When the Congressional Hearings were held, concerning the provisions which were later to become part

of this Act, the statutory "presumption" was part of the New York Act. New York Workmen's Compensation Act, McKinney's Consol. Laws, c.67 §21. In addition to New York, three other state statutes presently contain language that it shall be presumed "in the absence of substantial evidence to the contrary: that the claim comes within the provisions of [the Act]."[7]

The Longshoremen's Act of March 4, 1927, 44 Stat. 1124, followed, in the main, the workmen's compensation law of the state of New York. *West Penn Sand & Gravel Co.* v. *Norton*, 95 F.2d 498 (3d Cir. 1938). Since Section 21 of the New York Act and Section 20 of the Longshoremen's and Harbor Workers' Compensation Act were identical, we should look to the construction of the New York Courts for guidance concerning how the statute is to be interpreted. *Employers' Liability Insurance Corp.* v. *Monahan*, 91 F.2d 130, 133 (1937); *Iacone* v. *Cardillo*, 208 F.2d 696 (1953).

In *Riley*, after the Court had decided that "the record here reveals that Petitioner did, indeed, suffer an 'injury' ", (Pet. App. 8a), the Court then turned its consideration to the statutory presumption of Section 20(a) of the Act and stated as follows:

> "In cases where there has been no question with respect to the existence of an injury 'in the course of' employment, the Act has been consistently interpreted to require that the injury be presumed to have arisen out of employment as well . . . ." (Pet. App. 8a)

After reviewing *Swinton* v. *Kelly*, 554 F.2d 1075, *cert. denied* 429 U.S. 820 (1976), *J. V. Vozzolo, Inc.* v. *Britton*, 377 F.2d 144 (1967), and *Butler* v. *District Parking*

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[7] Maryland Code, Art. 101 §64(a), Oklahoma Statutes, Annotated, Title 85 §27, Alaska Statutes, §23.30.120.

Management Co., 363 F.2d 682 (1966), on their facts, and with additional citation to *Mitchell* v. *Woodworth*, 449 F.2d 1097 (1971), and *Wheatley* v. *Adler*, 407 F.2d 307 (1968) (*en banc*), the Court said:

> "The following cases make clear the pervasive scope of the statutory presumption of compensability. Indeed, no decision of this Court has ever failed to apply the presumption to any facet of any claim before it. We now hold expressly that, where a claimant has been injured, the Act requires that, in the absence of substantial evidence to the contrary, a claimant be given the benefit of a rebuttable presumption that the injury arose out of *and in the course of the claimant's employment.*" (Emphasis supplied.) (Pet. App. 9a-10a)

The Court then noted that "by requiring the claimant to prove that the accident did, in fact, occur, the ALJ denied the claimant the benefit of this presumption". (Pet. App. 10a)

The question, therefore, arises: "who has the burden of proof in this case, and when does the presumption apply?" U.S. Industries asserts that the burden of proof was properly placed upon Riley by the Administrative Law Judge to prove an "accidental injury arising out of employment" and to further prove that it occurred "in the course of employment".

In view of the fact that once a presumption is applied, a presumed fact is treated as proved, it is important that this Court review when the presumption arises and when it does not. U.S. Industries urges that the Court of Appeals' statement that it has "never failed to apply the presumption to any facet of any claim before it", should demonstrate to this Court the need for a correct interpretation of this issue. U.S. Industries contends that the effect of universal application of the statutory

presumption to any claim or facet thereof under the Act, will extend the scope of the Act and make it accident and health insurance, covering anything that goes wrong in the human frame, since this Circuit has previously held that anything that goes wrong within the human frame is an "injury" under the Act. *Wheatley* v. *Adler*, 407 F.2d 307, 311 (1968).

Armed with *Riley*, an employee now may be in perfect health at quitting time from his usual employment, and the next day, if he has experienced an "internal failure" during the night, such as a heart attack, stroke, miscarriage, indigestion, or even the common cold, he may file his claim for workers' compensation and it will be presumed, as a matter of law, that his condition was work-related, and subject his employer to probable liability under this Act. Under *Riley*, the filing of the claim triggers the application of the statutory presumption and requires the employer to disprove the presumed fact that his condition of health was work-related.

Because this Act follows the New York Act, U.S. Industries asserts that two decisions of the New York court, construing the statutory presumption, prior to the enactment of this Act, are dispositive concerning Riley's burden of proof. In New York, by merely filing a claim, a claimant or his representative *cannot* avail himself of the benefit of the presumption that the claim comes within the provisions of the Act, i.e., that there was an "accidental injury arising out of and in the course of employment". The presumptions of Section 21 of the New York Act (Section 20 of our Act), do not relate to the fundamental question of the happening of an accident. This has been held to be a "jurisdictional fact to be supported by direct or circumstantial evidence".

evidence". *McHale* v. *Sheffield Farms Company, Inc.*, 184 N.Y. S. 576, 577 (1920). In *Lorshitsky* v. *Gotham Folding Box Co.*, 230 N.Y. 8, 12 (1920), the New York Court stated as follows:

> "It is not the law that mere proof of an accident without other evidence creates the presumption under Section 21 of the Workmen's Compensation law (Cons. Laws, Ch. 67), that the accident arose out of and in the course of the employment. On the contrary, it has been frequently held, directly and indirectly, that there must be some evidence from which the conclusion can be drawn that the injuries did arise out of and in the course of employment. . . ." 230 N.Y. 2.

Thus, the claimant and his representative must prove that the accident happened and that it occurred in the course of employment, before the presumption will arise that the accident "arose out of the employment", thus bringing the claim within the Act.

This was, no doubt, what the Court meant in *Eschbach* v. *Contractors Pacific Naval Air Bases,* 181 F.2d 860 (7th Cir. 1950), when, discussing the Section 20(a) presumption, the Court stated:

> "The fact as to causal connection between the employment and the injury is not one which is to be so presumed. In the hearing before the Deputy Commissioner, the burden was on the plaintiff to prove such fact." 181 F.2d 864 (1950).

See also, *Young & Co.* v. *Shea,* 397 F.2d 185 (5th Cir. 1968), *Furlong* v. *O'Hearne,* 144 F.Supp 266 (D. Md. 1956) *aff'd, O'Hearne* v. *Furlong,* 240 F.2d 958 (4th Cir. 1957), *Maryland Shipbuilding & Dry Dock Co.* v. *Daniel Jenkins,* 594 F.2d 404, 407 (4th Cir. 1979).

In *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935), this Court set forth the purpose of the presumption, and explained its operation. That case dealt with the presumption under Section 20(d), but the fact that *Riley* is under Section 20(a) is not distinguishable in dealing with its evidentiary effect, and whether a presumption is to arise. This Court said that "its only office is to control the result where there is an entire lack of competent evidence". Under *Del Vecchio,* in order to rebut the presumption, this Court found that an employer need only carry the burden of going forward with the evidence. The Court made it very clear that where both the employer and claimant offer evidence as to the issue in dispute, the trier of fact must resolve the matter based upon the whole body of proof, pro and con, without the Section 20 presumption.

U.S. Industries produced evidence convincing to the Judge and the Board, that Riley's injury did not occur in the scope of his employment, nor arise out of it. In *Riley,* the Court of Appeals confused the use of the presumption with the right of a claimant to *prove* a causal relationship between his medical condition and his work. Here, given the fact of no incident or accidental injury on November 19, 1975, Riley was not precluded at the hearing before the Administrative Law Judge from *proof* of causal relationship between his symptoms and his work activity; but, given the occurrence of symptoms at a time and place unrelated to his work, he does not have the benefit of the presumption. He must, therefore, prove that his injury flows from employment as effect from cause, i.e., that his condition "arose out of and in the course of employment". *Trudenich* v. *Marshall,* 34 F.Supp 486 (D.S.C. 1940). But, having chosen to proceed and pursue his claim on the occurrence of an injury (i.e., a traumatic event) on November

19, 1975, and having failed to prove that such an incident occurred at work, Riley should not, at this hour, be permitted by this decision of the Court of Appeals to retry his case on the theory of a general work-related aggravation. To permit this, would be to completely change the theory of the case upon which all parties have relied since hearings were first conducted in this matter on March 20 and March 24, 1978. (Pet. App. 20a) Fundamental fairness demands that the case end here, and this Court find that the only errors of law were those made upon review by the Court of Appeals.

III

With Or Without The Presumption, The Decision Of The Administrative Law Judge Was Based Upon Substantial Evidence.

The determination of whether a particular injury arose out of and in the course of employment, under the Act, is initially made by the Deputy Commissioner (Administrative Law Judge). In *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), this Court commented at length concerning the function of the hearing officer, and the law which requires that although facts may permit diverse inferences, the findings of the hearing officer should not be disturbed by a reviewing court. (See App. C) Both Riley's medical experts testified that there was a causal relationship between the alleged incident on November 19 and the disability which they were treating. However, these doctors expressed no opinion on the relationship between Riley's employment per se and the event on November 20 at 2:30 in the morning whether due to cardiac neurosis (J.A. 140), or arthritis.

Despite this Court's opinion in *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935), and statement about the

presumption that its only office is to control the result "where there is an entire lack of competent evidence", U.S. Industries believes that the Court of Appeals erroneously considered the statutory presumption as independent affirmative evidence, affecting the Court's review of the initial finding of the Administrative Law Judge, that the alleged incident never happened. *John W. McGrath Corp.* v. *Hughes,* 264 F.2d 314, 316 (1959). In the finding of the Court of Appeals, the Court states that there was "some dispute" as to whether Riley told his attending physicians about the accident which occurred on November 19, and whether Riley's co-worker and friend, the sole witness to the alleged accident, reported the incident the next day to the employer. These factors, plus the lack of proof of an "injury", were the basis of the defense of this action by U.S. Industries. Since the alleged incident on November 19, 1975 on the job, was unwitnessed by any employees on the job, except for Riley's close friend, Mr. Sutherland, the question of why this "accident" was reported late, and to whom it was reported, were most significant to the Administrative Law Judge. (Pet. App. 20a-26a) In addition, there were still other important facts which the Administrative Law Judge failed to mention or emphasize, which add to the weight of his opinion. These facts include testimony from the claimant that he first saw counsel about this case on December 16, 1975 (J.A. 32), and then on December 19 remembered that he "forgot" to tell Dr. Sanchez about the incident at Walter Reed Hospital on November 19, 1975. (J.A. 160) The Administrative Law Judge also did not give note or emphasize the fact that in May, June and July, 1975, prior to the November hospitalization, Dr. Wisotsky had seen Riley for arthritic pains (J.A. 134), and that Riley was carrying and taking arthritic medication on the day of this alleged injury.

(J.A. 22) He also did not include in his opinion, or emphasize the significance of Respondent's Exhibit G, the "retirement summary" Dr. Wisotsky wrote out on February 9, 1976 for the Sheet Metal Workers, wherein no mention of his November 19 "injury" is made.[8] (Respondents' Ex. G, R. 181, J.A. 115-121) He also did not mention the reports Dr. Sanchez made to the non-occupational union insurer, wherein the physician provided a negative answer to the question, "Is condition due to injury or sickness arising out of patient's employment?" (J.A. 164) A physician's answer to these questions was a "crucial fact" for denial of the claim in *Sun Shipbuilding & Dry Dock Co.* v. *Walker and Director, OWCP,* 590 F.2d 73 (3d Cir. 1978).

Accordingly, Riley's evidence, produced at the hearing, was not all affirmative, corroborative, or uncontradicted. There was, in fact, substantial evidence to the contrary, which the Administrative Law Judge chose to accept. This Court has stated that the Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results. *Baltimore & Philadelphia Steamboat Co.* v. *Norton,* 284 U.S. 408 (1932). However, such language does not require that the employee always wins or the employer always loses. The evidence presented by U.S. Industries herein is sufficient to compel a finding by this Court that no injury, within the meaning of Section 2(2), occurred and that the statutory presumption was inapplicable because Riley failed to prove that his injury occurred in the course of his employment with U.S. Industries. The Administrative Law Judge's opinion should, therefore,

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[8] No mention was also made that this retirement was discussed with Riley prior to November 1975 (J.A. 139, 142).

be affirmed. *Methel Walker* v. *Universal Terminal & Stevedoring Corp., et al.*, _____ F.2d _____ (3d Cir. No. 80-2142, April 10, 1981).

CONCLUSION

The decision of the Court of Appeals in *Riley* makes the statutory presumption apply to presume work-relatedness of any condition of health of an employee, whether the first symptoms of same arose on or off the job. Such interpretation is erroneous because it constitutes a judicial amendment of the Act to eliminate the requirement that an employee prove that he sustained an "accidental injury . . . arising out of and in the course of" his employment. It is only *after* an employee produces evidence that he sustained an injury while in the course of his employment that the presumption applies to require the employer to produce evidence that the incident which happened on the job, did not "arise out of employment" or cause the injury or condition. Once evidence has been presented to support the finding contrary to the presumption, "the presumption falls out of the case". *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935). To require an employer to disprove a presumed fact that an injury occurred in the course of employment, and make the employer *prima facie* responsible for all ailments of ordinary life, has the legal effect of making the employer an insurer of the health and safety of his employees twenty-four hours a day, while on or off the job.

Although this Act is to be liberally construed, U.S. Industries believes herein that the construction placed upon it in *Riley* by the Court of Appeals was never meant to be, and cannot be justified on the basis of legislative history, nor prior judicial interpretation. U.S.

Industries, therefore, respectfully asks this Court to reverse the judgment of the Court of Appeals with direction to reinstate the decisions of the Administrative Law Judge and the Benefits Review Board.

Respectfully submitted,

RICHARD W. GALIHER, JR.
Counsel of Record

GALIHER, CLARKE, MARTELL
& DONNELLY
1215 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8330
Counsel for Petitioner

Of Counsel:
RICHARD W. GALIHER
WILLIAM H. CLARKE
FRANK J. MARTELL
WILLIAM J. DONNELLY, JR.
GALIHER, CLARKE, MARTELL
& DONNELLY

APPENDIX

APPENDIX A

U. S. INDUSTRIES, INC.

Subsidiaries

Axelson, Inc.
Wyatt Industries, Inc.
Steel Tank Construction Company
Jernberg Forgings Co.
USI Quebec Group, Inc.
USI Overseas Holdings Ltd.
  Big Dutchman (International) A. G.
  Big Dutchman (Nederland) B. V.
Brown Moulding Company, Inc.
Duke City Lumber Company, Inc.
Superlite, Inc.
  Superlite Builders Supply, Inc.
Anderson Hickey Company
USI International, Inc.
A & S Building Systems, Inc.
Gerring Industries, Inc.
Thunander & Son, Inc.
USI Puerto Rico, Inc.
Barbados Children's Wear Co. Ltd.
Oomphies, Inc.
Talbott Knitting Mills, Inc.
Young Squire, Inc.
Health Industries, Inc.
Jimlar, Inc.
Columbian Optical Company
Memphis Optical Dispensary
Northeast Optical Co., Inc.
Uhleman Optical Company of Illinois
Seaway Importing Company
Teters (Hong Kong) Ltd. (subsidiary of USI Overseas Holdings Ltd.)
USI Credit Corp.
  Caribbean Industrial Credit Corporation
  Colonial American Life Insurance Company

Credico Financial Inc.
Credico Industrial Loan Company
Credico Consumer Discount Company
Maple Credit Ltd.
Wilgross Acceptance Company, Ltd.
Maple Financial Services, Ltd.
Penn Navigation Company Inc.
Nauta Corporation
Neptune Corporation
USIGENA Canada, Ltd. (subsiriary of USI Overseas Holdings Ltd.)
USI Properties Corp.
Properties Capital Corporation
USI Charter Realty Services Corp.
Diversity Insurance Company Ltd. (subsidiary of USI Overseas Holdings Ltd.)

APPENDIX B

INA CORPORATION
and its
Subsidiaries and Affiliates

Agri Insurance Underwriters Inc.
Alaska Pacific Assurance Company
Allied Insurance Company (formerly California Food Industry Insurance Company)
Atlantic Employers Insurance Company
Bankers Standard Fire and Marine Company
Bankers Standard Insurance Company
Blyth Eastman Dillon Capital Market Incorporated
Blyth Eastman Dillon & Co. International Holdings Limited
M. J. Brock & Sons, Inc.
California Union Insurance Company
Charter Oaks Mortgage Corp.
Coast to Coast Corporation
Robert F. Coleman, Inc.
Commercial Surplus Facilities, Inc.
Compagnie d'Assurances Colina S.A.
Compagnie Financiere INA
Compagnie La Henin Vie (40% Interest)
Compagnie Nouvelle d'Assurances (99.634% interest)
COMPAR Facilities, Inc.
COMPAR Facilities, Inc.
The Continental Assurance Company of London Limited
Datamann, Inc.
Diversified Insurance Agency, Inc.
Educators Fund Management Corporation
Educators Life Insurance Company of America
Educators Marketing Services Corporation
El Paso Abstract Co.
EFMC Services Corporation
ESIS, Inc.
Extra Cover Insurance Agency, Inc.
F. S. Agency, Inc.
F. S. Title Services Inc.

Fidelity National Title Insurance Company
GAMMA INAC, Inc.
HAI International Holdings, Ltd.
Horace Mann Educators Corporation
Horace Mann Insurance Company
Horace Mann Investors, Inc.
Horace Mann Life Insurance Company
Hospital Affiliates International S. A.
Hospital Affiliates International (UK) Limited (formerly Kalvernos Limited)
Hospital Affiliates of Australia Pty. Limited
Illinois Union Insurance Company (formerly GATX Insurance Company)
INA Bond Facilities, Inc.
INA Capital Advisors, Inc.
INA Capital Management Corporation (formerly Philadelphia Investment Company)
INA Coast to Coast Corporation
INA Commercial Finance, Inc., Bedford Building
INA Community Services Inc.
INA Community Services, Inc. of Ohio
INA Conference Facilities Holding Company, Bedford Building
INA Conference Facilities, Inc.
INA Constru ::on Risk, Inc. (50.0% interest)
INA Corporation
INA County Mutual Insurance Company (affiliated by way of management contract)
INA Diversified Services, Inc. (formerly INA Insurance Services, Inc.)
INA Eagle Lodge Properties, Inc.
INA Farm Center, Inc.
INA Farmers Insurance Company
INA Financial Corporation
INA Forsikrings Aktieselskab
INA Health Care Group, Inc., Bedford Building
INA Insurance Company of Canada

INA Insurance Company of Illinois
INA Insurance Company of Ohio
I.N.A. Insurance Company Limited
INA International Corporation
INA International Holdings, Ltd.
INA International Holdings Singapore, Limited
INA International Insurance Company
INA International Insurance Company Ltd.
INA International Insurance Managers, Ltd.
INA International Investors, Ltd. (95% Interest)
INA Life Insurance Company
INA Life Insurance Company of Canada
INA Life Insurance Company of New York
INA Loss Control Services, Inc.
INA Montgomery Properties, Inc.
INA of Texas
INA Overseas Finance N.V.
INA Properties, Inc.
INA Properties of Colorado, Inc.
INA Properties of Delaware, Inc.
INA Properties Processing Center, Inc.
INA Reinsurance Company
INA Reinsurance Company, S.A. (formerly INA Assurance Corporation, S.A.)
INA Reinsurance Company (U.K.) Limited
INA Security Corporation
INA Service Company
INA Special Risk Facilities, Inc.
INA Standard, Inc.
INA Sudamericana S.A.
INA Title Insurance Company
INA Trading Corporation
INA U.K. Holdings, Ltd.
INA Underwriters Insurance Company (formerly Allied Insurance Company)
INA Underwriting Agency Limited
INA Universal Corporation (formerly BETA INAC, Inc.)

INA Whitemarsh Properties, Inc.
INAC Corp.
INAC Corp. of California
INACAN Holdings Ltd.
INACAP, S.A.
INACAP Reaseguros, S.A.
INAMAR, LTD.
INAMEX S.A.
INAMIC LTD.
INAPRO, Inc.
INAX Incorporated (2) (formerly Extra Cover, Inc.)
INAX Underwriters Agency, Inc. (formerly GATX Underwriters Agency)
Indemnity Insurance Company of North America (formerly The Stuyvesant Insurance Company)
Insurance Company of Africa (15% Interest)
Insurance Company of North America
Insurance Company of North America (Australia) Limited
Insurance Company of North America (Hellas) A.E.
Insurance Company of North America (Ireland) Limited
Insurance Company of North America (New Zealand) Limited
Insurance Company of North America (U.K.) Limited (formerly Signal Imperial Insurance Company Limited)
Insuror Management Company
International Service Corporation
International Surplus Adjusting Services
International Survey and Adjustment Co., Ltd. (37.492% Interest)
Inversiones INA Ltda. (69.362% Interest)
Investors Life Insurance Company of North America (formerly First Investment Annuity Company of America)
JTX Club, Inc. (formerly Bankard Club, Inc.)
La Nouvelle, S.A.
LATINA Holdings, Ltd.
Lewis & Norwood, General Agents, Inc.

Life Insurance Company of North America
Lime Street Properties, Ltd.
Lime Street Services Limited (formerly Eightyfare Limited)
Logan Land Company, Inc.
L. S. Holding Company
Maritime—INA General Insurance Company Limited (50% interest)
MarketDyne International, Inc.
MarketDyne of Canada Limited
Master Life Insurance Company
E. J. McConnell & Associates, Ltd. (10% interest)
Mealane Corp.
Mealane of Canada, Ltd.
Membership Assistance Corporation (formerly Membership Service Corporation)
Montgomery and Collins, Inc.
Montgomery and Collins, Inc. of Connecticut
Montgomery and Collins, Inc. of Florida
Montgomery and Collins, Inc. of Illinois
Montgomery and Collins, Inc. of Indiana
Montgomery and Collins, Inc. of Massachusetts
Montgomery and Collins, Inc. of New Jersey
Montgomery and Collins, Inc. of Ohio
Montgomery and Collins, Inc. of Pennsylvania
Montgomery and Collins, Inc. of Texas
Montgomery and Collins, Inc. of Wyoming
Montgomery and Collins Limited
National Employee Benefits Corporation
National Health Care Corporation
New Enterprise Associates L.P. (12.5% interest)
Northern Woods Products Association, Inc.
Norton Life Insurance Company
Pacific Employers Insurance Company
Paine Webber Incorporated (22.66% common stock equity interest)
Pan Arabian Insurance Company Limited (35% Interest)

Parkway Management Corporation (40% Interest)
Petroleum Insurance, Inc.
Philadelphia Investment Corporation
Philadelphia Investment Corporation of Delaware
Premier Escrow Company
Public Employees Insurance Company
Public Employees Insurance Service
Recovery Services International, Inc.
Reinsurance Consultants Limited
Richgart, Inc.
J. D. Robb & Assoc. Insurance Brokerage, Inc.
R & I Joint Venture
Sacramento Escrow Company
Self-Insurers' Management Corporation
Societe Civile Immobiliere TURINA
Southern Title Guaranty Co., Inc.
Standard Life Insurance Company of Indiana
Stellate, Inc.
Surplus Insurance Brokers of North America, Inc.
Surplus Insurance Brokers of North America, Inc.
Surplus Insurance Brokers of North America, Inc.
Teachers Insurance Company
Teachers Insurance Underwriters
The 1792 Company (42.1% Interest) (formerly INA RE Exchange Investors, Inc.)
2525 East Arizona Biltmore Circle Corporation
UNINA Insurance Company Limited (42.1% Interest)
Well-Care, Inc.

BLYTH EASTMAN DILLON & CO. INTERNATIONAL
Holdings Limited Subsidiaries

Blyth Eastman Dillon & Co.
Blyth Eastman Dillon & Co. International Limited

HOSPITAL AFFILIATES INTERNATIONAL, INC.
Subsidiaries and Affiliates

Acadiana Psychiatric Hospitals, Inc.
Affiliated Mid-West Hospitals, Inc. (Hospital Affiliates of Missouri, Inc. merged into, 8/10/79)
(1) Chicago Lakeshore Hospital
(2) Doctors Hospital
(3) Riveredge Hospital
(4) Saint Peters Community Hospital
AHS Management Services, Inc.
AHS of Newport, Inc.
AHS of Virginia, Inc.
(1) Dominion Psychiatric Center
AHS Realty, Inc.
AHS South, Inc.
AHS West, Inc.
AID Health Care Centers, Inc.
AID Health Care Centers, Inc.
AID International, Inc.

INA HEALTH CARE GROUP, INC.
Subsidiaries

Hospital Affiliates International, Inc.
INA Beaumont Acquisition Corporation
INA Healthplan, Inc.
International Rehabilitation Associates, Inc.
Alief General Hospital, Ltd. (81% Interest)
American Institutional Pharmacy, Inc.
American Psychiatric Hospitals, Inc.
American Psychiatric Hospitals of California, Inc.
(1) Woodview—Calabasas Hospital
American Psychiatric Hospitals of Houston, Inc.
Berrien County Hospital, Inc.
Centre City Hospital, Limited Partnership (38.5% Interest)
Cherry Hill Medical Center, Inc.

Clearwater Properties, Inc.
Community Health Management, Inc.
Conroe Hospital Corporation (98.2% Interest)
Cumberland Medical Center, Inc.
Dauterive Hospital, Inc.
DeKalb Convalescent & Nursing Residence Inc.
(80% Interest)
Eastwood Hospital, Inc.
Edgewood Manor, Inc.
(1) Durham Rehabilitation Center
(2) Providence Convalescent
(3) Brentwood Rehabilitation Center
Forest Park Nursing & Convalescent Center, Inc.
(1) Golf Drive Residence, Inc.
(2) Lee Convalescent Center, Inc.
(3) Manatee Convalescent Residence, Inc.
(4) Spanish Gardens Nursing & Convalescent Center, Inc.
GH Hospital, Inc.
Georgia Playcare, Inc.
(1) Playcare at College Park
(2) Playcare at Forest Park
(3) Playcare of Smyrna
(4) Playcare at Tucker
Grandview Manor, Inc.
Grant-Buie Hospital, Inc.
GULCO, Inc.
H.A.I. of Florida, Inc.
Haverford Hospital Corporation
Henrico Doctors Hospital & Diagnostic Clinic, Inc.
Hospital Affiliates Counseling Corporation of New York
Hospital Affiliates Development Corporation (formerly Health Facilities Development Corporation)
Hospital Affiliates International, Inc. S.A.R.L.
Hospital Affiliates, Inc.
Hospital Affiliates, Inc. d/b/a Allied Laboratories
(1) Allied Laboratories
(2) Lewisburg Community Hospital
(3) Diagnostic Center Hospital

(4) Hendersonville Community Hospital
(5) Del Oro Labs
Hospital Affiliates, Inc.
(1) Belhaven Hospital
(2) Tidelands Hospital
(3) Medical Center Del Oro Hospital
(4) North Shore Medical Plaza, Inc.
(5) Deer Park Hospital
(6) La Hacienda Treatment Center
(7) General Hospital of Lakewood
(8) Eastwood Hospital Building
(9) Alief Hospital Building
Hospital Affiliates International, Ltd., Inc.
Hospital Affiliates Management Co., A.G.
Hospital Affiliates Management Company of Loudon, Tennessee, Inc.
Hospital Affiliates Management Corporation (formerly Hospital Management Corporation)
Hospital Affiliates Management Corporation
Hospital Affiliates Management Corporation
Hospital Affiliates Management Corporation (formerly Hospital Management Corporation)
Hospital Affiliates Management Corporation of Georgia
Hospital Affiliates Management Corporation of St. Louis
Hospital Affiliates of Alabama, Inc.
Hospital Affiliates of Arkansas, Inc.
Hospital Affiliates of Austin, Inc.
Hospital Affiliates of Baton Rouge, Inc.
(1) Doctors Memorial Hospital
Hospital Affiliates of Florida, Inc. d/b/a Coral Reef Hospital
(1) Coral Gables Hospital
(2) Coral Reef General Hospital
Hospital Affiliates of Georgia, Inc.
Hospital Affiliates of Louisiana, Inc.
Hospital Affiliates of New Mexico, Inc.
Hospital Affiliates of New Orleans, Inc.
(1) De Paul Hospital

Hospital Affiliates of North Carolina, Inc.
(1) Orthopedic Hospital of Charlotte
Hospital Affiliates of Ohio, Inc.
Hospital Affiliates of South Dakota, Inc.
Hospital Affiliates of Virginia, Inc.
Hospital Management Consulting Corporation
Hospital Management Corporation of Ohio
Hospital Management Corporation of Sweetwater, Inc.
Hospital Underwriting Group, Inc. (48.76% Interest)
Hurst General Hospital, Inc.
Margate General Hospital, Inc.
Medical Affiliates, Ltd. (56.25% Interest)
Medicorporation Acquisition Corporation
Mental Health, Inc.
(1) Ridgeview Institute
N. C. Playcare, Inc. (11)
Neuro Affiliates Company (12) (50% Interest)
North Beach Medical Center, Inc.
North Penn Convalescent Residence, Inc.
(1)
(2) Adams Manor
(3) Doylestown Convalescent
(4) Duke Convalescent
(5) Stroud Manor
(6) Rosemont Manor
Orange Medical Complex, Inc.
Petersburg Psychiatric Institute
Peninsula Psychiatric Hospital
Program for Alcoholism, Addiction, Stress and Anxiety, Inc.
Psychiatric Institute of New Orleans, Inc. (50% Interest)
Sequatchie General Hospital, Inc.
Spring Branch Memorial Hospital, Inc.
TranScan, Inc.
Valley View Convalescent Residence, Inc. (80% Interest)
WG Hospital, Inc.
WMH Health, Inc.
Woman's Hospital, Inc.

INA HEALTHPLAN, INC.
Subsidiaries and Affiliates

HMO International
INA Healthplan of Arizona, Inc. (formerly ABC-HMO, Inc.)
INA Healthplan of Florida
INA Healthplan of Northern California, Inc.
INA Healthplan of Texas, Inc.
INA Healthplan of Tucson, Inc.
INA Healthplan of Washington, Inc.
R-L Pharmacies
Ross-Loos Health Plan of Southern California
Ross-Loos Hospital, Inc.
Ross-Loos Hospital of Los Angeles, Inc. (50% Interest)
Ross-Loos Medical Group, Inc.
Temple Insurance Company Limited

HMO INTERNATIONAL
Subsidiaries and Affiliates

California Medical Group Health Plan, Inc. d[b]a INA Healthplan of California
Coastal Insurance (Bermuda) Limited
Coastal Insurance Company (Cayman) Ltd.
Health Incorporated
Medicalab Management Corporation
Pharmaceutix, Inc.

INVERSIONES INA LTDA.
Subsidiaries

Compania de Seguros Generales INA Kappes, S.A. (99:357% Interest)
Compania de Seguros de Vida INA Kappes, S.A. (85.824% Interest)

LATINA HOLDINGS. LTD.
Subsidiaries and Affiliates

COLINA Insurance Company, Limited (formerly Abbey International Insurance Company Ltd.)
Companhia Colina de Seguros
Compania de Seguros Cruz Azul, S.A. (97.098% Interest)
Compania de Seguros Generales Philadelphia, Consolidada Agricola E. Industrial S.A. (53.4% Interest)
Contabilidad Mecanizada, S.A.
INAVEN C.A.
La Positiva Compania Nacional de Seguros, S.A. (14.95%)
La Venezolana de Vida (10% Interest)
Reaseguradora International, S.A. (20% Interest)
San Lorenzo Compania de Seguros (18.9% Interest)
Seguros Azteca, S.A. (12.96% Interest)
Seguros Colina, S.A.

PAINE WEBBER INCORPORATED
Subsidiaries and Affiliates

Abacus Fund Security Corporation
BEDARCO, Inc.
BEDCO Insurance Agency of Arizona
BEDCO Insurance Agency of Florida, Inc.
BEDCO Insurance Agency of Georgia, Inc.
BEDCO Insurance Agency of Massachusetts, Inc.
BEDCO Insurance Agency of Ohio, Incorporated
BEDCO Insurance Agency of Oklahoma, Inc.
BEDCO Insurance Agency of Puerto Rico, Inc.
BEDCO Leasing Company, Inc.
BEDCO Overseas Corporation (Puerto Rico)
BEDCO Tankers (No. 1), Inc.
Blyth Eastman & Co. S.A. (France)
Blyth Eastman Dillon & Co. Incorporated of Illinois
Blyth Eastman Dillon & Co. International Corporation (Liechtenstein)
Blyth Eastman Dillon & Co. International S.A.

Blyth Eastman Dillon & Co. (Overseas) S.A. (Switzerland)
Blyth Eastman Paine Webber Health Care Care Funding, Inc. (formerly Blyth Eastman Dillon Health Care Funding, Inc.)
Blyth Eastman Paine Webber Incorported
Blyth Eastman Paine Webber International Limited
Blyth Eastman Paine Webber International, S.A. (Panama) (formerly Paine Webber International S.A.)
Capitol Street Holding Corporation
Champlain Holding Corporation
Channelview Leasing Company, Inc.
C T Monroe Corporation
Eastdil Leasing Corp.
First Income Properties Fund, Inc.
Fitchburg Holding Corporation
Hornell Holding Corporation
Hudson Holding Corporation
Maiden Lane Leasing Corp.
Monroe-Delsea Financial Corporation
Paine Hornell Corporation
Paine Webber A.G., Zug (Switzerland)
Paine Webber Far East Limited (Tokyo)
Paine Webber Futures Management Corporation
Paine, Webber, Jackson & Curtis Incorporated
Paine, Webber, Jackson & Curtis Incorporated of Puerto Rico
Paine, Webber, Jackson & Curtis Limited
Paine Webber Mitchell Hutchins Inc.
Paine Webber Mitchell Hutchins International Inc.
Paine Webber Mitchell Hutchins Overseas Limited
Paine Webber Properties, Inc.
Paine Webber Real Estate Leasing Corporation
Paine Webber Real Estate Securities, Inc.
Paine Webber Realty Investments, Incorporated
Paine Webber Venture Management Inc.
Painweb Nominees

Pomeroy Realty Incorporated
PW Capitol Street Holding Corporation
PW Champlain Corporation
PW Fawcett Corporation
PW Fitchburg Corp.
PW Franklin Corporation
PW Freemont Corporation
PW Idlewild Corporation
PW Hudson Corporation
PW Management, Inc.
PWJC Insurance Agency (Massachusetts) Inc.
PWJC Insurance Sales (Arizona) Incorporated
PWJC Insurance Sales Incorporated
PWJC Insurance Sales (Montana) Inc.
PWJC Insurance Sales (Wyoming) Inc.
PWJC Sales Agency, Inc.
Realty Service Corporation of Delaware
Second Income Properties, Inc.
Third Income Properties, Inc.
Wyodack Construction Co.

APPENDIX C

***Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 477-479 (1947)**

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Thus questions as to whether an injury arose out of and in the course of employment necessarily fall within the scope of the Deputy Commissioner's authority. Section 21(b), 33 USCA § 921(b), 10A FCA title 33, § 921(b), then provides that compensation orders may be suspended or set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law."

In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the

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opposite *inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. Voehl v. Indemnity Ins. Co. of N. A. supra (288 US 166, 77 L ed 678, 53 S Ct 380, 87 ALR 245); Del Vecchio v. Bowers, 296 US 280, 287, 80 L ed 229, 233, 56 S Ct 190; South Chicago Coal & Dock Co. v. Bassett, 309 US 251, 257, 258, 84 L ed 732, 736, 737, 60 S Ct 544; Parker v. Motor Boat Sales, 314 US 244, 246, 86 L ed 184,

189, 62 S Ct 221; Davis v. Department of Labor & Industries, supra (317 US 256, 87 L ed 250, 63 S Ct 225).

It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See Boehm v. Commissioner, 326 US 287, 293, 90 L ed 78, 84, 66 S Ct 120, 166 ALR 708. It is likewise immate.'al that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. Del Vecchio v. Bowers, supra (296 US 287, 80 L ed 233, 56 S Ct 190). Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. Labor Relations Bd. v. Hearst Publications, 322 US 111, 131, 88 L ed 1170, 1184, 64 S Ct 851; Commissioner v. Scottish American Invest. Co. 323 US 119, 124, 89 L ed 113, 116, 65 S Ct 169; Unemployment Comp. Commission v. Aragon, 329 US 143, 153, 154, ante, 136, 144, 145, 67 S Ct 245. Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only "if not in accordance with law."

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CLERK

No. 80-518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., *Et Al., Petitioners,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Et Al., Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF OF RALPH RILEY, RESPONDENT

JAMES F. GREEN
Counsel of Record

PATRICK S. GUILFOYLE
KARL N. MARSHALL
ASHCRAFT & GEREL
Suite 700
2000 L Street, N.W.
Washington, D.C. 20036
(202) 783-6400

Counsel for Respondent

Of Counsel:

LEE C. ASHCRAFT
MARTIN E. GEREL
JAMES A MANNINO
MARK L. SCHAFFER
ROBERT B. ADAMS
WAYNE M. MANSULLA

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether the presumption of Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 920 (a), "that the claim comes within the provisions of this Act," requires an employer to adduce evidence showing the absence of a causal relationship between the worker's disabling condition and his employment.

2. Whether an employer can overcome the presumption of employment-relatedness of a worker's disabling condition by evidence that an alleged specific accident while at work did not occur, without addressing with substantial evidence, the relationship between the condition and the general activities of the employment.

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IN THE

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OCTOBER TERM, 1980

No. 80-518

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v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Et Al., Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF OF RALPH RILEY, RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. C 3a-11a) is reported at 627 F.2d 455. The opinion of the Benefits Review Board (Pet. App. D 12a-18a) is reported at 9 B.R.B.S. 936. The opinion of the Administrative Law Judge (Pet. App. E 19a-26a) is not reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 22, 1980. A petition for rehearing was denied on July 3, 1980 (Pet. App. A 1a-2a). The petition for writ of *certiorari* was filed on September 30, 1980, and was granted on March 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Code, Title 33:

§902. Definitions

When used in this chapter—

* * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * *

§903. Coverage

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury . . .

* * *

§920. Presumption

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

March 4, 1927, c.509, §20, 44 Stat.1124

§921. Review of Compensation Order

* * *

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified . . .

United States Code, Title 28:

§1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

District of Columbia Code:

§36-501. Longshoremen's and Harbor Workers' Compensation Act Made Applicable to the District of Columbia.

The provisions of chapter 18 of title 33 U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

COUNTERSTATEMENT OF THE CASE

Respondent Ralph Riley worked as a sheet metal worker for thirty-two years (Pet. App. D 12a). On November 19, 1975, while in the employment of U.S. Industries, Riley was working at Walter Reed Hospital hoisting duct work into ceiling trapeze hangers. Riley was working with another sheet metal worker, Howard Sutherland, on a two-tiered scaffold. When the work day was nearly ended and most of the workmen had left, Riley attempted to raise himself to the second level of scaffolding in order to adjust the duct work he and Sutherland were lifting into place (J.A. 21, 22). Riley testified that as he ascended to the higher level, which afforded little room to maneuver (J.A. 9), he hit his neck and shoulders on the overhanging duct work (J.A. 8-10, 15, 21-22). Sutherland, the only eyewitness to the accident, corroborated Riley's account of the accident (J.A. 6-20).

The injury was painful, and Riley immediately took Indocin, a medication that he carried with him for arthritis. Having rested for a short period of time, he left the job site for home. Riley went to bed early because of the pain but awoke about 2:30 a.m. in extremely severe discomfort. Riley awakened his wife and she drove him to the emergency room of La Plata Hospital (J.A. 25, 26).

The initial concern of the attending physician was that Riley was suffering from a heart ailment. While Riley was rushed off for a cardiogram and placed in intensive care, his wife gave his medical history as best she could (J.A. 26). The hospital monitored Riley for three days in an effort to determine the cause of his pain (J.A. 27).

On the fourth day, November 23, 1975, Riley was examined by Doctor Guillermo Sanchez who was eventually able to diagnose Riley's pain as an arthritic neck condition rather than a heart problem (J.A. 83-85, 157). Although Doctor Sanchez's medical history does not mention the accident, Riley testified that he told Doctor Sanchez about the incident (J.A. 44). Furthermore, there is no question that on the first day he returned to work, November 26, 1975, Sutherland reported that Riley's condition was work-related. Sutherland testified that at his first opportunity he "told the guys at work that Mr. Riley had struck his neck and shoulders on the duct" (J.A. 11). This testimony was corroborated by John Fury, the foreman, although he could only vaguely remember Sutherland saying that Riley was hurt on the job (J.A. 11, 77, 78).

Following his discharge from the hospital,* Riley saw Doctor Herbert Wisotsky on December 5, 1975.

* It is undisputed that since that hospitalization Riley has been permanently and totally disabled from employment.

Doctor Wisotsky stated that he obtained only a very brief history from Riley at that time. However, Doctor Wisotsky remembered that Riley had related that his injury and hospitalization had been due to an accident at work (J.A. 127, 128). This testimony comports with Riley's statement that he told Doctor Wisotsky about the November 19 accident during his December 5 office visit. (J.A. 57).

In late November or early December, Riley received a phone call from James A. Bettis, an agent for the union of which Riley was a member. Mr.Bettis was calling on behalf of Blackie Brandsfield, the employer's general superintendent, to find out when Riley was returning to work (J.A. 70, 71). Riley was surprised to discover that his employer had taken no action to compensate him for his injury (J.A. 54). Riley informed Bettis he was still receiving medical care and inquired as to the proper insurance carrier to contact. Somewhat later, in mid-December, Riley called James Killeen, another union agent, to inquire further about receiving compensation. Both Bettis and Killeen corroborated the content of these conversations (J.A. 54, 55, 70-75).

When the claimant heard nothing further concerning his compensation request, he sought the advice of an attorney. As a result, a claim form was filed December 29, 1975. Petitioner controverted the claim for compensation under the Act. Following a hearing on the merits, the Administrative Law Judge (hereinafter referred to as ALJ) determined that Riley had not reported the accident to his treating physicians or his employer until after his hospitalization; that Riley and Sutherland had fabricated the story of the accident; and that no such incident had occurred (Pet. App. E, 25a). Without further discussion of Riley's cervical osteoarthritis, the ALJ denied his claim for compensation (Pet. App. E 19a-26a).

Riley appealed to the Benefits Review Board, which affirmed by a two-to-one vote. The Board majority concluded that the ALJ's finding that the alleged accident had not occurred had a reasonable basis in the record (Pet. App. D 12a-16a). Board Member Miller dissented on the ground that "the real issue in this case is not whether claimant sustained an accident at work but whether claimant's injury is causally related to his employment" (*id.* at 17a-18a). Member Miller reasoned that because the ALJ incorrectly focused his attention exclusively on whether the claimant had sustained a particular accident, his decision contained no analysis or findings as to whether the employer had presented sufficient evidence to rebut the presumption contained in Section 20(a) "that the claim comes within the provision of the Act" (*id.* at 18a). Accordingly, he would have remanded the case to the ALJ for further findings (*id.* at 18a).

The claimant filed a petition for review of the Benefits Review Board's decision in the Court of Appeals, and the Director, Office of Workers' Compensation Programs intervened in support of his position. The Court of Appeals reversed the Board's decision and remanded for further proceedings (Pet. App. C 3a-11a). The Court did not question the ALJ's finding that the alleged accident had not occurred. It held instead that the injuries suffered by the claimant [his arthritic neck condition and its sudden exacerbation] might nevertheless have been 'employment-bred' and that the claimant was entitled, by virtue of Section 20(a) of the Act 33 U.S.C. 920(a), to the rebuttable presumption that they were (Pet. App. 10a). Because the ALJ focused exclusively on the occurrence of the alleged accident, however, he had not made the necessary findings.

Accordingly, the Court remanded the case for further consideration, without "anticipat[ing] what these findings will be" (*id.* at 11a).

ARGUMENT

I. The Presumption Of Section 20(a) Of The Longshoremen's Act Applies To The Employment-Relatedness Of The Claimant's Disabling Condition.

A. Statutory framework

The "coverage" provision of the Longshoremen's Act, Section 3(a), 33 U.S.C. 903(a), requires the payment of compensation for "disability or death of an employee, . . . if the disability or death results from an injury. . . .[1] The term "injury," by its definition in Section 2(2) of the Act, 33 U.S.C. 902(2), constitutes the general "employment-relatedness" requirement for compensability, common to all workers' compensation statutes in the same or similar terms. See, generally, 1 A. Larson, *The Law of Workmen's Compensation* §§6.00, 6.10 (1978; 1A *id.* §29(1979)).

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[1] For purposes of the Longshoremen's Act itself, the term "employee" in Section 3(a) is defined by Section 2(3), 33 U.S.C. 902(3), to include only persons "engaged in maritime employment" subject to certain exceptions. Further, Section 2(a) goes on to require that the "injury" "occurr[ed] upon the navigable waters of the United States (including [adjoining land areas used in maritime operations])." (See, generally, *P.C. Pfeiffer Co.* v. *Ford,* 444 U.S. 69 (1979); *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249 (1977). These criteria of coverage, known as the "status" and "situs" requirements respectively, are inapplicable to claims brought under the statutory extensions of the Act, such as respondent Riley's under the District of Columbia Worker's Compensation Act (see, *Travelers Ins. Co.* v. *Cardillo,* 141 F.2d 362 (D.C. Cir. 1944)), and are not involved in this case.

It encompasses an "accidental injury *** arising out of and in the course of employment, and such occupational disease *** as arises naturally out of [the] employment ***." Section 2(2).[2]

The presumption in Section 20(a) of the Longshoremen's Act, "[t]hat the claim comes within the provisions of th[e] Act," applies to the question whether the claim satisfies the general compensability requirements of the Act. The other presumptions, Section 20(b), (c), (d), 33 U.S.C. 920(b), (c), (d), relate to affirmative defenses available to the employer under Section 12, 33 U.S.C. 912 (lack of prompt notice of the injury to, or knowledge of it by, the employer) and Section 3(b), 33 U.S.C. 903(b) (causation of the injury by intoxication or by willful intention of the employee). So far as relevant to the present case, Section 20(a) encompasses the general "injury" requirement, that the disabling condition be employment-related. No basis in law exists for petitioner's assertion that Section 20(a) applies only to the "arising out of employment" requirement in cases where the claimant has already established that the injury occurred "in the course of employment."[3]

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[2] Petitioner asserts that the statutory terms "arising out of and in the course of", form a two-prong test, both elements of which must be met to establish entitlement to compensation (Pet. Br. 13). On the contrary, this interpretation ignores the historical construction of these statutory words. The two-prong test has been described as dicta and treated as such. *Ward and Gow* v. *Krinsky*, 259 U.S. 503 (1922).

[3] Petitioner would extend the presumption only to those claimants who have no need of it. Moreover, as the court in *Swinton* v. *J. Frank Kelly Inc.*, 554 F.2d 1075 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976) said: "The statutory presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." 554 F.2d

B. Established construction of the provision adopted by Congress

The law enacted by Congress in 1927[4] drew heavily on the substantive and procedural provisions of New York's workers' compensation law. See *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 205 (1949). See *Wynn* v. *Kelly*, 223 F. Supp. 873 (D.D.C. 1973). New York decisions construing the language which later became Section 20(a) of the Act show that this provision governed not only questions of statutory applicability, but also the general compensability requirement of employment-relatedness.

The presumption of Section 21(1) of the New York Workmen's Compensation Law, enacted in 1914,[5] is identical to Longshoremen's Act Section 20(a). Its initial application was to whether the injured worker's employment was within the law's coverage — "hazardous employments" as enumerated in Section 3(1) of the law. See, *McQueeney* v. *Sutphen & Hyer*, 167 App. Div. 528, 153 N.Y. Supp. 554 (1915); *Kobyra* v. *Adams*, 176 App. Div. 43, 162 N.Y. Supp. 269 (1916). But it was very early applied also to the question whether injuries were "accidental" and "arising out of and in the course of employment," within the law's definition of "injury," Section 2(7). See, *Powley* v. *Vivian & Co.*, 169 App. Div. 170, 154 N.Y. Supp. 426, 431 (1915); *Fleming* v. *Robert Gair Co.*, 176 App. Div. 23, 162 N.Y. Supp. 298 (1916) (occurrence of alleged accident in course of work and causal relationship to proven hernia presumed). The New York Court of Appeals itself cited the Section 21(1)

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at 1082. See also, *Wheatley* v. *Adler*, 407 F.2d 207 (D.C. Cir. 1968).

[4] Act of March 4, 1927, c. 509, 44 Stat. 1424 (Longshoremen's and Harbor Worker's Compensation Act).

[5] N. Y. Laws 1914, c. 41, Sec. 21(1).

presumption, though it found that it had been overcome, in an early case involving an iceman's alleged injury that witnesses testified had not occurred. *Carroll* v. *Knickerbocker Ice Co.*, 218 N.Y. 435, 113 N.E. 507, 508 (1916). In *Collins* v. *Brooklyn Union Gas Co.*, 171 App. Div. 381, 156 N.Y. Supp. 957 (1916), however, the presumption was held applicable only to statutory coverage questions, not extending to the issue of occurrence of an employment-related accidental injury. *Collins* was later cited with apparent approval by the Court of Appeals in *Eldridge* v. *Endicott Johnson & Co.*, 228 N.Y. 21, 126 N.E. 254, 255 (1920), although the discussion is equally consistent with the view that the evidence overcame whatever effect the presumption had. Nevertheless, the compensation commission and courts continued to rely on the presumption on "injury" questions, particularly in cases in which the circumstances surrounding injuries and deaths could not be definitely ascertained, and the Court of Appeals affirmed. See, *Chludzinski* v. *Standard Oil Co.*, 176 App. Div. 87, 162 N.Y. Supp. 225 (1916), *Driscoll* v. *Gillen & Sons Lighterage,* 187 App. Div. 908, 173 N.Y. Supp. 825, *aff'd per curiam* 226 N.Y. 12, 123 N.E. 863 (1919); *Smith* v. *A.M. Oesterheld & Son,* 189 App. Div. 384, 179 N.Y. Supp. 10 (1919), *aff'd per curiam* 229 N.Y. 525, 129 N.E. 901 (1920); *Cirello* v. *Great Lakes Dredge & Dock Co.*, 231 N.Y. 556, 132 N.E. 886 (1921) (Per curiam). In *Norris* v. *New York Central R. Co.*, 246 N.Y. 307, 158 N.E. 879, 880-881 (1927), the Court of Appeals cited the discussion in *Smith* v. *A.M. Oesterheld & Son, supra,* which was in turn based on application of the presumption in *Driscoll, supra,* with full concurrence. While the *effect* of the presumption has varied somewhat in New York law, its *applicability* to the employment-relatedness question under the definition of "injury" has never been subject to much question.

C. Congressional understanding in enacting Section 20(a)

The scope of the application of the New York law's presumption was not addressed specifically in the hearings leading to enactment of the Longshoremen's Act in 1927, but the broad language and apparent effect of its adoption did not pass unnoticed.

While many objections to the bills's overall coverage were voiced throughout the many days of hearings, a shipyard representative, in protest of the bill's broad coverage described how the Section 20(a) presumption (a feature which was not then common among the existing state compensation acts) would be applied to a typical shipyard worker's injury under the proposed law—

> Here is a man who may work 90 percent of his time upon the construction of a ship on shore as a painter, we will say. Ten percent of his time he might work on the ship and he might become infected with lead poisoning. Now, out of the 90 percent of the time being on shore Virginia expressly excludes any compensation [for occupational disease], but for the 10 percent that he is working on the ship this bill — either the Senate bill or the House bill — would undertake to require us to give him a compensation for occupational disease.
>
> Now, I see there are presumptions [in Section 20]. I should have used that when discussing the question of occupational disease. [In Section 20] you have provided — I am telling you about the difficulty when you come to occupational diseases.
>
> This is the Senate bill. It is Section 20 of [S.] 3170. [Reading:]
>
> In any proceeding for the enforcement of a claim for compensation under this act it shall be presumed in the absence of substantial evidence to the con-

> trary, first, that the claim comes with the provisions of this act.
>
> Then it speaks about the sufficiency of notice and about intoxication. What I want to bring to your attention is ["] that the claim comes within the provisions of this Act.["] Just as soon as the man that I described, that had been working a few minutes on the boat, who had given all of this time practically to work on the shore, just as soon as he contracts any disease, he will claim that it comes under this act, and the presumption under this act is that it does shifting absolutely the burden of proof. The employer has to prove the negative; and for God's sake tell me how you are going to find out where a man contracted a disease. He can tell you he contracted it in painting some small part of the ship, and under that presumption how in the world are you going to defeat him? Hearing on S. 3170 before the House Judiciary Committee, 69th Cong. 1st Sess. 196, 198 (1926).[6]

Yet the bill was enacted without change in the relevant provision. The witness's testimony, which stood uncontradicted in its description of the presumption's effect, was unequivocally based on the understanding that Section 20(a) would apply to the question of the relationship between the covered employment (that aboard ship) and the disability.[7]

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[6] Statement made by E.M. Braxton, representing Newport Shipbuilding and Dry Dock Co., the largest employer of labor in the Commonwealth of Virginia. Petitioner and Amicus echo this philisophical concern, contending that the Court of Appeals' pronouncement in *Riley* has opened Pandora's Box so that even the common cold may now be compensable. As Mr. Braxton's testimony makes clear, this tidal wave was cited fifty-five years ago and has yet to reach shore (Petitioner's Br. 24, Amicus Br. 21-25).

[7] Amicus urges that the holding of the Court below is directly contrary to the Administrative Procedure Act, 5 U.S.C. § 556;

D. Judicial precedent under The Longshoremen's Act

This Court has never considered what questions in litigation are subject to the effect of the Section 20(a) presumption. It has, however, invoked the presumption several times. In *Davis* v. *Department of Labor and Industries of the State of Washington,* 317 U.S. 249 (1942), the Court described the presumption as one of "jurisdiction" under the Act, *i.e.*, statutory coverage of the circumstances of the injury, and indicated that it would support an award under the Act in the constitutional "twilight zone" in which the Act's coverage was a close question. 317 U.S. at 256. Again in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), the Court described Section 20(a) as applying to the Act's "jurisdiction" of coverage, indicating that it "applies with equal force to proceedings under the District of Columbia Act." 330 U.S. at 474. Far from *limiting* the presumption's scope to coverage questions, the Court has also invoked it in support of an award where the sole question was the employment-relatedness of a worker's death. In *O'Keeffe* v. *Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (1965), the contested issue was whether the worker's death met the Section 2(2) definition of "injury," *i.e.*, whether it "ar[ose] out of and in the course of employment." The Court quoted the Act's allocation of fact-finding authority to the deputy commissioners (now administrative law judges), its limitations on judical review, *and the Section 20(a) presumption*, and indicated that all three operate to "limit the scope of judicial review of the [factfinder's]

(Amicus Br. 23). The cited section states: "*Except as otherwise provided by statute,* the proponent of a rule or order has the burden of proof" (emphasis supplied). Implicit in the decision on appeal is an understanding that Congress had, in fact, "otherwise provided" when it drafted Section 20(a).

determination that a 'particular injury arose out of and in the course of employment.' " 380 U.S. at 361. Clearly the Court understood the presumption to apply to the question as to whether the disabling condition or death constituted an "injury" as defined in Section 2(2), rather than just to the *other* element of statutory "coverage" in Section 3(a).

Legislative history and precedent thus confirm that the presumption of Section 20(a) "that the claim comes within the provisions of this Act" was not intended to be, and never has been, limited in its effect to questions of statutory coverage of the type and place of employment involved. It applies as well to disputes about the employment-relatedness of the worker's disabling condition or death, *i.e.*, whether it constitutes an "injury" as defined in Section 2(2).[8] Despite scattered dicta to the contrary, the Courts of Appeals have recognized this proposition. See, *Swinton* v. *J. Frank Kelly, Inc.*, 554

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[8] Petitioner attaches much significance to *Eschbach* v. *Contractors Pacific Naval Air Bases*, 181 F.2d 860 (7th Cir. 1950), in which the 7th Circuit declined to extend the Section 20(a) presumption to the question of causality. However, the Circuit's interpretation of this provision is equivocal at best, for it was later to hold: "We begin with the proposition that where there is a doubtful factual question as to whether an injury arises out of employment, the law presumes compensability." *Continental Insurance Co.* v. *Byrne*, 471 F.2d 257 (7th Cir. 1972), *cert. denied*, 406 U.S. 918 (1972). Moreover, Petitioner and Amicus cite the Fourth Circuit decision in *Furlong* v. *O'Hearne* 144 F. Supp. 266 (D. Md. 1956), aff'd. 240 F.2d 958 (4th Cir. 1957). But it should be noted that the principle there is wholly inapposite to the instant case. While the District Court in *Furlong* held that the presumption in Section 20(a) does not relieve the claimant of the necessity of proving injury, this was dicta in light of the fact that the claimant introduced uncontradicted evidence of injury. On appeal, the lower court was affirmed in an opinion which did not address the presumption issue.

F.2d 1075, 1082 & n.34 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976); *J.V. Vozzolo, Inc.* v. *Britton,* 377 F.2d 144, 149 (D.C. Cir. 1967); *Gardner* v. *Director, OWCP,* 640 F.2d 1385, 1388, 1391 (1st Cir. 1981); *John W. McGrath Corp.* v. *Hughes,* 264 F.2d 314, 314 (2d Cir.), *cert. denied,* 360 U.S. 931 (1959); *Marra Bros.* v. *Cardillo,* 154 F.2d 357, 359 (3d Cir. 1946); *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP (Jenkins),* 583 F.2d 1273, 1278-79, (4th Cir. 1978), *cert. denied,* 440 U.S. 915 (1979); *Eller & Co.* v. *Golden,* 620 F.2d 71, 73 (5th Cir. 1980); *Continental Insurance Co.* v. *Byrne,* 471 F.2d 257, 260-61 (7th Cir.), *cert. denied,* 406 U.S. 918 (1972); *Ridgley* v. *Ceres, Inc.,* 594 F.2d 1175, 1177 (8th Cir. 1979); *Parsons Corp.* v. *Director, OWCP,* 619 F.2d 38, 40-41 (9th Cir. 1980).[9] Petitioner suggests no basis in law or policy for disturbance of this settled view of the broad application of the Section 20(a) presumption to employment-relatedness issues.[10] The Court of Appeals' invocation of the presumption in Riley's aid on the question of the employment-relatedness of his disabling cervical-spine condition was proper.

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[9] Petitioner citing *Evening Star Newspaper Co.* v. *Kemp* 533 F.2d 1224, 1234 (D.C. Cir. 1976), perceives a contradiction within the District of Columbia Circuit on the presumption question. The language which petitioner so liberally quotes (a dissenting opinion) neither addresses the presumption nor represents the holding of the court (See Pet. Br. 20).

[10] Amicus opines that even without the expansion of the statutory presumption, the cost and impact of workers'compensation is profound (Amicus Br. 22-23). Amicus illustrates this contention with reference to fiscal woes suffered by the Washington Metropolitan Area Transit Authority (WMATA) as a result of compensation claims. It appears that WMATA has begun to solve the problem by being more mindful of safe working conditions (See Appendix A).

II. The Presumption Governs Where The Circumstances And Evidence Fairly Suggest An Inference That The Claimant's Disabling Condition Is Causally Related To His Or Her Employment.

Section 20(a) does not say what showing must be made by a compensation claimant in order to give rise to the presumption. Indeed, its introductory terms — "In *any proceeding* for the enforcement of a claim for compensation under this Act" (emphasis supplied) — suggests that it places the burden of coming forward with "substantial evidence," negating the compensability of the claim, on the employer at the outset. In practice, however, this suggestion is never acted upon; claimants come forward with their supporting evidence at the outset of formal hearings under the Act, although employers and their insurance carriers understand that they must come forward with evidence to overcome the effect of the presumption regardless of how weak the claimant's proof may be. Accordingly, there is very little precedent regarding what must be shown before it becomes incumbent on the employer to present "substantial evidence to the contrary" in order to avoid the controlling force of the presumption.

Whatever little judicial precedent exists, however, provides a perfectly adequate standard, which appears to be consistent with the decision below. In *Wheatley* v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968) *en banc* the Court reasoned:

> The possibility that Wheatley's death was due to urinating-in-the-cold is not a mere fancy or wisp of "might have been" like the musing of the old judge in Whittier's poem who was enchanted by the sight of Maud Muller. It was volunteered by Dr. Thomas as a realistic possibility providing meaningful perspective for his opinion. This certainly sufficed, in

> the light of the statutory presumption, to require substantial evidence in refutation, at least to articulate that this possibility was improbable — if he could say that it was improbable.

407 F.2d at 313.

And in *Swinton* v. *J. Frank Kelly, Inc.* 554 F.2d 1075 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976), the Court relied on *Wheatley's* reasoning:

> [T]he statutory presumption may be dispelled by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event. It cannot be said, however, that the evidence in this case rose to that level. Here, as in *Wheatley,* no medical expert offered any opinion as to causality; no expert espoused a view that the back ailment was not bred or intensified by his fall. And surely the evidence, such as it was did not of its own force serve to disestablish the possible affinity of the two.
>
> The caliber of proof, if circumstantial, which the statutory presumption demanded is shaped in part by the fact that here, as in *Wheatley*, the thesis that Swinton's current affliction arose from the accident is "not a mere fancy or wisp of 'might have been.' "

554 F.2d at 1083.

The standard of *Wheatley* and *Swinton* may be taken to mean that "specific and comprehensive" evidence, sufficient to justify a finding adverse to the claimant with respect to a "potential connection" between the disabling condition and the employment, need only be produced by the employer with respect to a "potential connection" which is fairly inferable from, or suggested by, the record evidence. In practice, it makes little difference whether the presumption is regarded as

applicable to *any* potential causal link to the employment or only to such a connection that has some degree of record support as contemplated by *Wheatley* and *Swinton*. Where such support is lacking, certainly mere *general* negative evidence will suffice to rebut the presumption, whereas greater particularity can reasonably be required of the employer's evidence to the contrary where the record contains support for a particular theory of causal connection.

The Court of Appeals herein did not decide the degree of evidence necessary to require rebuttal, nor did it determine the requisite specificity of the rebuttal. Like the dissenting member of the Benefits Review Board, it found no need to address those issues because both the employer's evidence and the ALJ's findings concerned exclusively the question whether the alleged accident on November 19, 1975 had in fact occurred. The ALJ found that no such accident happened. That finding was a permissible inference from the employer's disputed evidence, which the ALJ credited, that neither Riley nor his co-worker had informed anyone of the accident until some days later, and the Court of Appeals afforded that finding the full deference to which it was entitled. Rather than impermissibly disturbing the ALJ's finding, the Court held that it was "not responsive to the issue properly presented for resolution" (Pet. App. 10a) — the more general question whether Riley's disabling condition of cervical arthritis is employment-related. On this question the employer presented no evidence whatsoever; the record may be searched in vain for any medical or other evidence indicating, specifically or even in the most general terms, that the condition was unrelated to Riley's work.

On the other hand, the "potential connection" between Riley's neck condition and his employment is suggested by the circumstances of the case. Riley was employed as a sheet metal worker for some thirty-two years (Pet. App. 13a).[11] The record contains several descriptions of the nature of his duties installing overhead sheet metal duct work; it is performed in large part from below (See, J.A. 6, 20, 21). Anyone who has ever spent five minutes painting a ceiling or replacing a light bulb in a ceiling fixture is familiar with the proposition that overhead work puts a strain on the neck. Of course the inference that thirty-two years of such work might cause, contribute to, aggravate, or accelerate the development of cervical osteoarthritis may well be medically unwarranted, and despite petitioner's failure to produce any evidence on the point, the Court of Appeals has extended the employer the opportunity to present such evidence on remand if it can.[12] But the possibility of such a relationship can fairly be inferred from the

---

[11] Under the long-established "last employer" rule, the duration of the worker's tenure with the particular employer against whom the claim is filed is immaterial. If the employer is the last in whose employ the worker was subject to the conditions of employment that produced the occupational disease, it is liable in full for the disability caused by the disease. See, *General Dynamics Corp.* v. *Benefits Review Board,* 565 F.2d 208 (2d Cir. 1977). See, generally, 4 A. Larson, *The Law of Workmen's Compensation* §§ 95.11, .12, .21 (1979).

[12] Petitioner correctly described the question for the ALJ on remand in its Reply to the respondents' brief in opposition to the Petition for Certiorari:

> Upon remand the Administrative Law Judge is to decide now whether Riley's [condition] was precipitated or aggravated by the ordinary conditions of his employment as a sheet metal worker and to consider the applicability of the presumption of causal relationship as applied [sic] to the facts of this case.

Pet. Reply Br. at 9 (citation omitted).

nature of Riley's employment and his disabling condition. This realistic possibility is enough to require the employer to produce at least some "evidence to the contrary." Petitioner has not done so.

Even if such a lay inference of a causal relationship, based on common experience and the circumstances of the case, should be regarded as a less than compelling ground in itself for invocation of the Section 20(a) presumption, the Court of Appeals was correct in applying the presumption to the alternative potential connection on the record in this case. For the record contains the testimony of two medical witnesses, both of whom directly supported the proposition that the nature of Riley's duties, requiring "overhead type" exertion and "involv[ing] quite a bit of hyperextension of the neck," at least aggravated Riley's condition (J.A. 130, 158, 162). Yet the ALJ made no reference to this alternative potential causal link between Riley's condition and his employment.

Petitioner notes that Riley placed no positive reliance on an occupational-disease theory at the hearing before the ALJ. (Pet. Br. 11). This aspect of trial strategy resulted from full confidence that Riley's assertion of the occurrence of an accident on November 19, 1975 would be accepted. In any event, the absence of a clearer assertion of an occupational-disease theory at the first hearing would not preclude his presentation of such a theory at a new hearing even were this Court to reverse the Court of Appeals and reinstate the ALJ's original decision. By virtue of Section 22 of the Longshoremen's Act, 33 U.S.C. 922, determinations under the Act have only the most limited finality. On the assertion that the ALJ was mistaken in his determination that Riley's condition is not an "injury" within Section 2(2), Riley is en-

titled to reopen his claim and present new evidence, regardless of its availability at the time of the earlier hearing. *O'Keeffe* v. *Aerojet General Shipyards,* 404 U.S. 254 (1971). *Banks* v. *Chicago Grain Trimmers Ass'n,* 390 U.S. 459 (1968). Nothing precludes him from presenting even an entirely new theory in support of his claim in Section 22 modification proceedings. The Act contemplates such modifications; petitioner's assertion that the Court of Appeals was wrong to consider the potential work-relatedness of Riley's injury ignores this important right under the law. The ALJ's findings and discussion are, as the Court of Appeals reasoned, facially inadequate for resolution of the work-relatedness issue. The record is replete with evidence dispositive of the connection between the claimant's injury and the nature of his employment. That claimant did not rely expressly on the work-relatedness theory does not vitiate the ALJ's duty to answer the whole question before him — whether the claimant's disability was "caused by an injury" as defined in Section 2(2). As the Court of Appeals held, the ALJ's decision in this case stopped short of answering that question, and thereby erred in failing to accord the Section 20(a) presumption its appropriate role.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JAMES F. GREEN
Counsel of Record

PATRICK S. GUILFOYLE
KARL N. MARSHALL
ASHCRAFT & GEREL
Suite 700
2000 L Street, N.W.
Washington, D.C. 20036

Counsel for Respondent

Of Counsel:

LEE C. ASHCRAFT
MARTIN E. GEREL
JAMES A MANNINO
MARK L. SCHAFFER
ROBERT B. ADAMS
WAYNE M. MANSULLA

APPENDIX

APPENDIX A

Washington Star, June 16, 1981 pp. at B1, B3

Metro Work Mishaps Cut, Cash Saved

Strong Safety Effort Produces Dividends

By Thomas Crosby
and Elissa Cottle
Washington Star Staff Writers

Metro has been saving millions of dollars through an aggressive safety program that has dramatically reduced the number of accidents on Metrorail construction sites while also reducing insurance costs.

The program has been so successful that Metro officials last week disclosed that they expect to save an estimated $8.3 million in insurance costs for construction next fiscal year.

At one time, construction on the 101-mile Metrorail system was considered one of the most dangerous jobs in the nation, but the transit agency's safety awareness program has cut accidents almost in half, said Don Bunn, a Metro insurance analyst.

Because Metro construction is resulting in fewer accidents, competition has begun for the first time in years among insurance companies vying for the Metro insurance contract. Last year, that contract cost Metro $30 million; next year it will be only $21.7 million.

The brainchild of John S. Egbert, Metro's assistant general manager for design and construction, the safety program was started in June 1978 with cash awards to firms that complete a project with an accident rate below Metro's average for that type of work.

"If a contractor does a typical job, he breaks even," said David Shilling, a project monitor for the $21 million tunneling for the Forest Glen Metrorail station. "If he does lousy, he pays the transit authority and if he does good, he gets a bonus."

Currently, 41 of the 50 Metrorail construction firms are in the program (the other nine began work before the program started).

For example, Metro's average accident rate for tunneling projects is 9.7. The rate is determined by taking the number of lost work days, multiplying it by 200,000 and dividing by the number of man hours worked.

Peter Kiewit and Sons Co., which is boring the hard rock tunnel for Forest Glen, gets $14,000 from Metro for every one-tenth of a percentage point on its safety rate below 9.7. If Kiewit's record is 9.5 when the firm completes work in October, it will receive $28,000 from Metro.

So far, however, the firm has put in 350,000 working hours without a single injury, said Shilling, and may be able to collect as much as $280,000 when the job is done — the maximum Metro agreed to pay for a safe construction job.

"I think it's a good program," said Shilling. "It gives a contractor incentive to do a good job."

During the first several years of Metrorail construction, the transit agency's accident rate exceeded the national average because Metro paid insurance claims and it made no financial difference to contractors if they had a bad safety record.

The attitude among many contractors was "If you're not paying the bill what difference does it make?" said Shilling.

In 1979, Metro paid $38.1 million for construction insurance but for the last three years the safety program has been saving the transit agency about $7 million a year, said Delmar Ison, Metro's insurance director.

"In 1977 we woke up to the fact that we had to get these high-level benefits (for injured workers) under control," said Ison, who added that awareness of safety has permeated the entire construction hierarchy, from the workers to the company owners.

With fewer workers being injured, Metro has to pay fewer Workmen's Compensation claims. In the District, Workmen's Compensation claims are the second highest in the nation (Alaska is higher), but with fewer claims being made, insurance companies are willing to reduce their premiums to insure the approximately 6,000 workmen building the subway.

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No. 80-518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., *et al.*, *Petitioners,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *et al.*, *Respondents.*

On Writ Of Certiorari To
The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RALPH RILEY, RESPONDENT

RICHARD W. GALIHER, JR.
Counsel of Record

WILLIAM J. DONNELLY, JR.
GALIHER, CLARKE,
MARTELL & DONNELLY
1215 – 19th Street N.W.
Washington, D.C. 20036
(202) 331-8330
Counsel for Petitioners

Of Counsel:
RICHARD W. GALIHER
WILLIAM H. CLARKE
FRANK J. MARTELL

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BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RALPH RILEY, RESPONDENT

This brief of the Petitioners (collectively "U.S. Industries") replies to the brief of the Respondent, Ralph Riley.

ARGUMENT

I. Respondent Misinterprets the Term "Arising Out of and in the Course of Employment" by Asserting that Injury Should be Defined to be "Employment-Relatedness."

Respondent's brief, beginning at page 8, urges this Court to define "injury" under the Act to mean "employment-relatedness" rather than "arising out of and in the course of employment," 33 U.S.C. § 902(2). In support of this interpretation, Respondent cites 1, Larson, *The Law of Workmen's Compensation*, §§ 6 and 6.10.

These sections of Larson both deal only with interpretation of the phrase "arising out of the employment." Respondent's brief at page 21 admits that he did not claim that the injury suffered by Riley was an "occupational disease." Having admitted this fact, Respondent cannot argue that the statutory language requires only "employment-relatedness" when the applicable statute clearly reads "accidental injury arising out of *and* in the course of employment" (emphasis supplied). Petitioners assert that if Congress had intended the definition of injury to be "employment-relatedness" that the statute would state this as the "definition" of injury, rather than its present language. However, Larson also recognizes a "course of employment requirement test." 1, Larson, *The Law of Workmen's Compensation*, §14. Larson therein notes that correct interpretation of the provision "arising out of and in the course of employment" requires not only that injury "arise out of employment," but also arise "in the course of the employment." This phrase requires work connection as to time, place and activity and "demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment." 1, Larson, §14, p. 4-1.

In addition to admitting that Respondent made no claim for occupational disease, Respondent's brief at page 22 admits that he made no claim before the Administrative Law Judge on a "work-relatedness theory." Respondent's brief at page 19 also does not challenge the correctness of the Administrative Law Judge's finding that no accident happened on November 19, 1975. Thus, there is no dispute between the parties before this Court concerning the existence of substantial evidence of record for the finding of the Administrative Law Judge. Respondent's brief instead focuses upon an incorrect

definition of injury to urge this Court to affirm the lower court. Respondent has cited no cases under the Act nor its legislative history to persuade this Court that "employment-relatedness" should be a definition of injury under this Act, or was intended to be a definition of injury under this Act at the time of its passage. Petitioners assert that liberal construction of the Act does not compel affirmance of the finding of the lower court herein, where plain statutory terms have been ignored.

II. The Statutory Presumption Does Not Apply Until the Employee Has Produced Facts to Prove an "Accidental Injury Arising Out of and in the Course of His Employment."

1. Respondent would have this Court declare that the statutory presumption is a presumption of law rather than fact. Respondent asserts on page 9 of his brief that no basis in law exists for Petitioners' assertion that 33 U.S.C. § 920(a) applies only to the "arising out of" requirement in cases where the claimant has already established that the injury occurred "in the course of employment." However, Respondent cites no authority rebutting or distinguishing the Petitioners' assertion. Petitioners in their previous Reply Brief to the Federal Respondent, cited numerous cases applying the presumption in this manner, and the lower court herein noted that in cases where there has been no question with respect to the existence of an injury "in the course of employment," the Act "has been consistently interpreted to require that the injury be presumed to be causally related and to have arisen 'out of' employment as well." (Pet. App. 8a).

Petitioners' brief does not challenge the applicability of the presumption once the claimant has shown that an accidental injury occurred in the course of his employ-

ment.[1] However, Petitioners question the applicability of the presumption to make this "injury," found by the lower court to occur at 2:30 a.m. at home, to be presumed to be related to earlier employment with this employer. The New York decisions cited by the Respondent in his brief on pages 10-11 do not support a contrary view than this. In each of the cited cases the worker was engaged in work at the time of injury of benefit to the employer or on the employer's premises. As such, they were in the course of their employment. If the presumption was applied at all, it applied to make the employee's injury or death compensable, due to employment-related risk occurring at or near the site of employment.

Respondent's brief on pages 12-13 cites Congressional testimony of V. M. Braxton in support of Respondent's interpretation of the operation of presumption. However, it should be noted that his description of the presumption's application was in connection with an occupational disease rather than a traumatic injury or aggravation. The statutory definition of occupational disease does not require that the disease arise out of and in the course of employment, but only "arises out of" the employment. 33 U.S.C. 902(2). In the cited example, once the claimant's injury was shown to have been due to exposure aboard ship, then it was Mr. Braxton's assumption that a causal relationship would be presumed.

Respondent at page 17 of his brief suggests that the burden of coming forth with "substantial evidence" negating the compensability of the claim is on the employer

[1] Petitioners embrace the position of the Amicus regarding this Court's prior interpretation of the presumption while noting that many Circuits, including the D.C. Circuit, have presumed injury to "arise out of" employment when occurring "in the course of" that employment.

at the outset. In reply, Petitioners state that the practice of requiring the claimant to proceed first is because the claimant has the burden of proof to establish that a work incident occurred which could have resulted in his injury. These initial allegations are the very basis of his claim and constitute his *prima facie* case. Petitioners assert that this burden of proof does not place an onerous burden upon the claimant, and by requiring claimant to prove these elements, permits the employer to investigate the circumstances of claimant's alleged injuries. These issues are issues on which the claimant is more capable of producing evidence than the employer and are more properly litigated without the benefit of the presumption.

Respondent on page 19 asserts that Petitioners presented no evidence to show that the arthritic condition was unrelated to Riley's work; however, no claim was previously made by the Respondent that it was related, and therefore no evidence was required to be produced in that regard. In support of this argument, the Respondent on page 20 argues, without support in the record, that overhead work puts a strain on the neck and that 32 years of such work "might" result in the development of cervical arthritis.[2] After arguing this alleged "potential connection," then Respondent on page 20 cites the *"possibility"* of such a condition related to employment. However, contrary to Respondent's brief on page 21, none of the medical witnesses testified that Riley's work duties *per se* aggravated his condition. To the contrary, each doctor was asked to base his opinion on whether or not the incident at work on November 19, 1975 "aggravated" Respondent's pre-existing arthritic condition. (J.A. 129, 162). Even the lower court's remand requires

[2] It might also be argued however that normal "wear and tear" and age might cause such a condition.

the Administrative Law Judge to make a further fact finding on this issue (Pet. App. 11a), rather than make such a presumption upon this record.

Petitioners assert that the Respondent's interpretation of the operational effect of the presumption from his reading of the decisions in *Swinton* v. *J. Frank Kelly, Inc.*, 554 F.2d 1075, *cert. denied* 429 U.S. 820 (1976) and *Wheatley* v. *Adler*, 407 F.2d 307, 313 (1968), is incorrect and places too stringent a burden on the employer for presenting proof to rebut the presumption. Under the lower court's ruling it would be impossible for an employer to rebut an inadequately detailed claim, since the employer would have to prove that nothing in the employment could possibly have caused claimant's injury. Only when claimant has met his dual burden of establishing that he has suffered harm and that the alleged accident in fact occurred in the course of his employment, does the Section 20(a) presumption of causal connection (that the harm was caused by the accident) apply. The presumption then operates to link the harm with the injured employee's employment.

2. Respondent in his brief on pages 21-22 asserts that 33 U.S.C. § 922 would permit him to reopen his case and present new evidence. The statute provides as follows:

> MODIFICATION OF AWARDS
>
> SEC. 22. Upon his own intiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim review a compensation case in

> accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

Respondent has never previously argued the applicability of Section 922 in any brief filed by him before the Benefits Review Board, or the lower court. This statutory provision should not now be an issue in this case. *Parker* v. *Motor Boat Sales,* 314 U.S. 324 (1941). Respondent's admission on page 22 that he did not rely on a "work-relatedness" theory does not support his assertion on page 21 that the Administrative Law Judge was "mistaken" in his determination that Riley's condition was not an "injury" within 33 U.S.C. 902(2). Further, the record is not "replete" with evidence dispositive of the connection between the claimant's injury and the nature of his employment, as asserted on page 22 of Respondent's brief. In fact, with the acceptance of the Administrative Law Judge's findings of fact by the lower court and by the Respondent herein, the only evidence which now remains concerning an "injury" is the lower court's finding it occurred at 2:30 a.m. on November 20, when he awoke in pain and was hospitalized. (Pet. App. 7a). No evidence of "potential connection" between this

hospitalization and employment is suggested by the circumstances of this case. This is the reason why the lower court in remanding could not anticipate what further findings would be. (Pet. App. 11a).

CONCLUSION

Respondent in his brief on page 17 correctly states that 33 U.S.C. 920(a) does not by its terms state what showing must be made by a compensation claimant in order to give rise to the presumption. The lower court found that the hospitalization of Respondent during the early morning hours of November 20, 1975 was an "injury" under the Act and gave rise to the operation of presumption. (Pet. App. 8a). Under the lower court's interpretation, the presumption is a "statutory presumption of compensability" (Pet. App. 9a). In rebuttal, Petitioners assert that the threshold question before the presumption can apply is whether or not the injured party has sustained "injury" within the meaning of the Act. Such injury as defined unambiguously in the statute must be an "accidental injury arising out of and in the course of employment" for the injury to be compensated. It is asserted that the presumption does not apply until evidence and facts are produced by a claimant to show that his disability is a result of an "accidental injury arising out of and in the course of employment," and is therefore related to his employment. If substantial evidence is produced by the employer controverting the claim, as was presented herein, then the burden of proof remains with the claimant. *Del Vecchio* v. *Bowers,* 296 U.S. 280 (1935).

The claimant is not foreclosed by the statute from presenting evidence of an accidental injury arising out of and in the course of employment, but such injury is not a presumed fact but one to be proven.

Petitioners suggest to this Court that contested "possibilities" concerning causal relationship not previously asserted or raised until raised by the lower court, or Respondent for the first time on appeal herein, should not entitle the Respondent to a new trial of his case. The findings of the Administrative Law Judge in this matter were supported by evidence and the presumption should not be used by the Court of Appeals to tip the scales in favor of compensation. The Administrative Law Judge was empowered to draw the inference, and his decision as to the weight of the evidence, with or without the presumption, should not be disturbed.

This statute was never intended to provide accident and health insurance for employees. If the opinion of the Court of Appeals is not reversed by this Court, every condition of health requiring medical treatment manifesting itself during non-working hours will result in a claim for workers' compensation benefits, which can only be rebutted, according to the D.C. Circuit opinions, by evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event," *Swinton* v. *J. Frank Kelly, Inc.*, 554 F.2d 1075, *cert. denied* 429 U.S. 820 (1976), or which shows that the "possibility was improbable." *Wheatley* v. *Adler,* 407 F.2d 307, 313 (1968). Petitioner submits to this Court that such an interpretation of the statutory presumption, if allowed to stand by this Court, will en-

courage the filing of frivolous and unmeritorious claims by employees against their employers, and make the employer's burden of defense a medical and factual impossibility.

Respectfully submitted,

RICHARD W. GALIHER, JR.
Counsel of Record

WILLIAM J. DONNELLY, JR.
GALIHER, CLARKE,
MARTELL & DONNELLY
1215 — 19th Street N.W.
Washington, D.C. 20036
(202) 331-8330
Counsel for Petitioners

Of Counsel:
GALIHER, CLARKE, MARTELL
& DONNELLY
1215 — 19th Street N.W.
Washington, D.C. 20036

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No. 80-518

IN THE

Supreme Court of the United States

October Term, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL.

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF FOR AMERICAN INSURANCE ASSOCIATION AS AMICUS CURIAE

JOHN C. DUNCAN, III
Suite 1010
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorney for American Insurance Association

WILLIAM P. DALE
KURT C. ROMMEL
Suite 1010
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO: The Supreme Court of the United States.

American Insurance Association respectfully moves for an order granting leave to file an amicus curiae brief in the above-entitled case pursuant to Rule 42 of the Revised Rules of this Court. Consents of the attorneys for the petitioner and the Federal respondent have been received. Consent of the respondent Riley has been refused.

The movant, American Insurance Association (AIA), is an unincorporated trade association of 150 property and casualty insurers. Its members represent a large percentage of the pro-

perty and casualty industry, particularly in the area of workers' compensation. The most recent figures available demonstrate that in 1979, AIA member companies wrote over $6 billion in direct workers' compensation premiums nationwide, including Longshoremen's and Harbor Workers' Compensation Act (Longshore) coverage, accounting for nearly 43% of the market for this type of insurance. While specific figures are not available, it is estimated that approximately the same percentage of Longshore coverage is written by AIA companies.

The AIA and its member companies are deeply concerned that the ruling of the District of Columbia Circuit Court of Appeals in *Riley* will place enormous stress upon an already over-burdened workers' compensation system. Even prior to the Court's decision in this case, insurers have had great difficulty in adequately pricing Longshore risks due to the fact that the benefits payable under that Act are far greater and far more certain than those payable under any state compensation system.

It is the view of the AIA and its members that the practical effect of the *Riley* holding will be to make virtually all medical ailments compensable, regardless of their origin, unless employers or their insurers can come forward with substantial evidence to rebut the presumption of causality. The AIA, as amicus curiae, seeks to assist the Court by presenting a discussion of the proper role of the statutory presumption found in 33 U.S.C. § 920(a) and the ramifications of the Court of Appeals ruling on the administration of the Act.

Petitioner and respondents are expected to primarily emphasize the merits of the Court of Appeals decision vis-a-vis the facts of the instant case and their clients' respective interests while discussing only peripherally the administrative implications of the Court's ruling, with even less attention being devoted to the historical background and role of the applicable statutory presumption. These issues, of utmost importance to the business community and insurance industry, will not adequately be presented by the parties, and thus it is for this reason

that the AIA moves this Court for leave to file the attached amicus curiae brief.

The attached amicus curiae brief of the American Insurance Association discusses both historically and legislatively the purpose for which the presumption in 33 U.S.C. § 920(a) was enacted. The roots of this section and the precedential decisions from the New York State courts, from whence the presumption came, are traced, and the legislative history leading to the passage of the Longshore Act are articulated for this Court's edification.

The brief then summarizes the departures from this purpose by nearly every Federal circuit, culminating in the District of Columbia Circuit's even further unwarranted expansion in the case under review. Finally, the brief discusses the potentially devastating impact it would have upon the administration of the Longshore Act and the business/insurance industry.

For the foregoing reasons, this motion for leave to file a brief as amicus curiae should be granted.

Dated: May 26, 1981

JOHN C. DUNCAN, III
Suite 1010
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/872-8411

WILLIAM P. DALE
KURT C. ROMMEL
Suite 1010
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR AMERICAN INSURANCE ASSOCIATION AS AMICUS CURIAE

SUMMARY OF ARGUMENT

The original purpose and scope of the presumption found in 33 U.S.C. § 920(a) is limited to the question of jurisdictional coverage under the Act. That provision was taken verbatim from the New York Workmen's Compensation Act, and at the time the Longshoremen's and Harbor Workers' Compensation Act (the Act) was passed in 1927, the New York courts had repeatedly construed the presumption to apply only to questions of jurisdictional coverage. Congress intended that role for the presumption when the statute was enacted. The

legislative history surrounding the passage of the Act, and the three cases in which this Honorable Court has considered the presumption all limit its application to jurisdictional coverage questions.

Despite this clear precedent, all federal appellate courts who have considered this statutory presumption, in varying degrees, appear to have extended its application to areas well beyond the issue of jurisdictional coverage. Prior to the present case, these presumption extensions had mainly been used to presume a nexus between a disabling condition manifesting itself during employment hours and the employment, or to presume a nexus between a subsequently manifested disabling condition and a previously proven employment-bred accident. The Court of Appeals decision in this case, which constitutes a major deviation from all previous extensions of the presumption, now simply allows a claimant to establish a medical infirmity, regardless of origin, and the burden then rests upon the employer to disprove that it was work-connected.

The unwarranted further expansion of the presumption embodied in the Court of Appeals decision will have a potentially disastrous effect, both cost-wise and administratively, on an already overburdened workers' compensation system. Prior to this case, the Act featured numerous safeguards designed to protect a claimant's interests, and these have been zealously guarded by the courts and administrative bodies dealing with the Act. These have proved more than ample to ensure proper recompense for meritorious claims, but with the Court of Appeals erasing the requirement of a worker having to show his ailment to be work-related, the filing and pursuit of questionable claims is encouraged with the ability to mount an effective defense virtually emasculated.

ARGUMENT

I

PURPOSE AND SCOPE OF THE PRESUMPTION FOUND IN 33 U.S.C. § 920(a)

The principal issue involved in the instant case has to do with the purpose, scope, and interpretation of the following provision of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter Act) found in 33 U.S.C. § 920(a):

> "§ 920. *Presumptions*
>
> "In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary -
>
> "(a) that the claim comes within the provisions of this chapter. . . . "

It has long been recognized by the various courts which have considered the effect of this presumption, and which is amply confirmed by the legislative hearings and history surrounding the passing of the Act, that the foregoing portion of the statute was taken verbatim from the New York Workmen's Compensation Act (New York Act). *Wynn v. Kelley,* 223 F.Supp. 875, *aff'd,* 120 U.S. App D.C. 13 (1963); *Terminal Shipping Co. v. Branham* 47 F.Supp 561, aff'd.136 F2d 655 (4th Cir 1942). It is, therefore, useful to consider how the foregoing presumption had been interpreted by the New York courts at the time the Act was passed in 1927.

When the relevant authorities are analyzed, it becomes abundantly clear that the presumption was included by the New York legislature in an effort to more readily bring injured workers within the jurisdiction and fundamental coverage of its Act rather than to relieve a claimant of the obligation of establishing that an accidental injury arising out of and in the course of employment had occurred. New York Workers Compensation Law § 21.

After the New York Act was passed, the jurisdictional presumption of coverage found in § 21 of the New York statute, was invoked to rebuff arguments that the injured worker was outside the Act's coverage because he had been injured while performing work which was alleged to be in interstate commerce [*Wingfield v. New York Central & H.R.R. Co.*, 168 A.D. 351, 153 N.Y.S. 499 (1915); *Okrzsezs v. Lehigh Valley R. Co.*, 170 A.D. 15, 155 N.Y.S. 919 (1915); *Fish v. Rutland R. Co.*, 189 A.D. 352, 178 N.Y.S. 439 (1919) *Saccomanno v. Grasse River R. Corp.*, 191 A.D. 761, 182 N.Y.S. 23, *aff'd.* 229 N.Y. 625, 129 N.E. 934 (1920)]; that the injured worker was an independent contractor rather than an employee within the intent of the Act [*In re Rheinwald*, 168 A.D. 425, 153 N.Y.S. 598 (1915); *Powley v. Vivian & Co.*, 169 A.D. 170, 154 N.Y.S. 426 (1915)]; that the injured worker was outside of the Act because he was performing duties away from the employer's premises *[Smith v. H.J. Bartle Mfg. Corp.*, 189 A.D. 426, 178 N.Y.S. 589, *aff'd* 228 N.Y. 564, 127 N.E. 922 (1919)]; and that the injured employee would not be within the Act because of the going and coming rule *[Kingsley v. Donovan*, 169 A.D. 828, 155 N.Y.S. 801 (1915)].

As the subject of the proper role and scope of § 21 of the New York Act was litigated, definitive pronouncements were articulated. In *Collins v. Brooklyn Union Gas Co.*, 171 A.D. 381, 156 N.Y.S. 957 (1916) [cited with approval by the New York Court of Appeals in *Eldridge v. Endicott Johnson & Co.*, 228 N.Y. 21, 126 N.E. 254 (1920)], a claimant's husband had died in a fall and death benefits were awarded. The appellate court, in reversing, noted that there was no evidence introduced to indicate that the decedent had stumbled or fallen, but there had merely been a showing of a sudden fainting during working hours causing a fall on hard pavement.

The Court observed:

> "It should, moreover, be said that the Deputy Commissioner incorrectly stated and applied the presumptions arising under § 21 of the Act. There is nothing

in § 21, or any other part of the Act, which relieves a claimant from producing evidence that the injuries arose 'out of and in the course of' an employment of the injured person by the employer against whom the claim is directed. Once that evidence of the employment, the injury in the course of it, the injury as a result of something arising from the employment, is submitted, the first presumption enumerated in § 21 carries presumption of the Commission's jurisdiction, the applicability of the statute, the 'hazardous' character of the employment proved, and the inclusion of the work being done by the injured person at the time of the injury within the scope of an 'employments' enumerated and defined as 'hazardous' (citations omitted), and the second, third, and fourth items of § 21 carry presumptions covering, in the absence of substantial evidence to the contrary, the other conditions precedent specified in § 10. The Commission is not authorized however, to make an award under the Act in the absence of at least some evidence that the employee met with an injury while he was at work for the specified employer and as a consequence of something that had a relation to the work of the employer, something done by him or by others while he was still employed. The Act does not undertake to make the employer an insurer of the life, health, or regular heart action, of an employee during the hours of labor, in the absence of proof that the injury was due, for example, to a fall caused by cardiac syncope arising from overexertion in the course of the employment."

In *Matter of Hanson v. Turner Construction Co.*, 224 N.Y. 331, 120 N.E. 118 (1918), the claimant collapsed and fell in an unwitnessed accident, and his death was found attributable to a blood clot and pressure on the brain. New York's highest court denied benefits, and in the course of its opinion stated as follows:

> "Under such circumstances, I do not see how an award could be made. If so, it had for its basis a mere guess or conjecture. The Workmen's Compensation Law should receive a liberal construction, but it ought not to be so construed to take money from one person and give it to another without any legislative basis therefor. To hold otherwise would be simply to make the employer an insurer of his employee, and this the Legislature has not as yet done."

Both *Collins, supra,* and *Eldridge, supra,* were followed in *White v. American Society for Prevention of Cruelty,* 191 A.D. 6, 180 N.Y.S. 867 (1920) involving an employee who had contracted an anthrax germ which had ultimately killed him. The claim was held to be non-compensable because of the absence of the requisite proof, and the court again reiterated that the presumption under § 21 of the Act could not be used as a substitute for such proof.

In *McHale v. Sheffield Farms Co.,* 193 A.D. 541, 184 N.Y.S. 576 (1920), an award in favor of a decedent who had fallen from a wagon and struck the back of his head, dying of meningitis, was reversed. The court said:

> "It thus appears, not only that there was no evidence of probative force to support the conclusion that the death resulted from an accident, but that it affirmatively appears that the death was due to disease, which is not shown to have had any relation whatever to any alleged accident. The presumptions declared in § 21 of the Act do not help the claimant. They do not relate to the fundamental question of the happening of the accident, which is in the nature of a jurisdictional fact to be supported by direct or circumstantial evidence, and the presumptions do not prevail over 'substantial evidence to the contrary'."

The same requirement of proving an accident and the limited role of § 21 of the New York Act was reaffirmed by the New

York Court of Appeals in *Lorchitsky v. Gotham Folding Box Co.*, 230 N.Y. 8, 128 N.E. 899 (1920). Later that year in the context of a case involving a custodian who was discovered lying about 50 feet from the employer's premises within an hour after he finished work, the presumption was again discussed as follows:

> "No broom was found upon the street to indicate that he had been engaged in sweeping the sidewalk at the time of the accident. As no other of his known duties would have called him to work outside the stable, no fact appears from which it could justly be inferred that the deceased was in the course of his employment when injured. Nor is the claim assisted in this respect by any presumption given by § 21 of the Workmen's Compensation Law. . . . We might have held otherwise were it not for the recent decision of the Court of Appeals in *Eldridge v. Endicott Johnson & Co.*, 228 N.Y. 21, 126 N.E. 254. That case is clear authority to the effect that all the elements of an accidental injury arising out of and in the course of an employment must be shown to exist by common-law proof, independently of the statutory presumption before a claim may be allowed. . . ." *Russo v. Jarvis Stores*, 193 A.D. 587, 588, 185 N.Y.S. 281, 282 (1920).

In *Joseph v. United Kimono Co.*, 194 A.D. 568, 569, 185 N.Y.S. 700, 701 (1921), an employee continued working on the ninth floor of a factory building despite complaints of pains in his head, and his body was eventually found lying on the sidewalk directly below a window on that floor. In reversing the widow's award, the court stated:

> "It having become firmly established that the occurrence of accidents causing compensable injuries may never be presumed, but must always be proven, the sole question here arising is whether the known facts of the case permitted the inference drawn by the

> Commission that the deceased came to his death from an accident attributable to his employment. . . ."

Later that same year, in conjunction with a claimed left eye injury as a result of dust particles, the court in *Pinto v. Chelsea Fibermills,* 196 A.D. 23, 186 N.Y.S. 748 (1921), remarked:

> "The rule is now established that all elements of an accidental injury arising out of and in the course of an employment must be shown to exist by common law proof before there is power in the Commission to make an award. § 21 of the Workmen's Compensation Law raises a presumptono that 'in the absence of substantial evidence to the contrary (a) that the claim comes within the provisions of this chapter', but this does not raise a presumption that an accident has happened because someone makes a claim for compensation. That is a fact jurisdictional in character, and it must be established by evidence."

In *Greenberg v. Greenberg,* 203 A.D. 343, 196 N.Y.S. 626 (1922), the court again noted:

> "The determination of the question as to whether the accident to the deceased arose out of his employment is jurisdictional in character and must be proved by direct or circumstantial evidence, unaided by the presumptions set forth in § 21 of the Workmen's Compensation Law."

This then was the state of the presumption under New York law at the time Congressional legislative hearings were held and when the Longshoremen's Act was enacted in 1927. Thus, in determining the Congressional intent, resort should be had to these New York authorities, for as the House report stated:

> "The bill follows in the main the New York State Compensation Law, which is considered one of the best owing to the fact it was drafted after most careful investigation by experts and others, and it has been

tion wherein jurisdictional coverage was to be presumed, in the absence of substantial evidence to the contrary, was what Congress had in mind. This view comports with the Supreme Court decisions which have had occasion to discuss the § 20 presumption.

In the case of *Davis v. Department of Labor of Washington,* 317 U.S. 249 (1942), a worker was drowned while in the performance of his employer's contract to dismantle a drawbridge, and the Supreme Court was called upon to determine whether or not the State of Washington's Workmen's Compensation Act had constitutionally permissible jurisdiction so as to entertain the death claim. In the course of the Court's opinion, Mr. Justice Black traced the history of the Federal versus state jurisdictional dilemma:

> "There is, in light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent, who are, as a matter of actual administration, in fact protected under the state compensation act.
>
> "Faced with this factual problem we must give great — indeed, presumptive — weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact-finding, determination, and award, our task proves easy.
>
> "There we are aided by the provision of the Federal Act, 33 U.S.C.A. § 920, which provides that in proceedings under the Act, jurisdiction is to be 'presumed in the absence of substantial evidence to the contrary'. Fact-findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is

> therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in *Parker v. Motor Boat Sales, Supra.*"

The Court then held that the Washington State Compensation statute was not unconstitutional.

The § 20(a) presumption was next addressed in the case of *Cardillo v. Liberty Mutual Insurance Co.,* 330 U.S. 469 (1947). Death benefits under the District of Columbia Workmen's Compensation Act were awarded in the face of employer contentions that the District of Columbia Deputy Commissioner did not have jurisdiction of the claim and that the death did not arise out of and in the course of employment. Jurisdiction was contended to exist solely with the Virginia Industrial Commission since the injury had occurred in that state.

The evidence showed that while the worker was in the process of returning from his job at the Quantico Marine Base to his home in the District of Columbia, a stone struck his automobile's windshield and killed him. In disposing of the employer's jurisdictional contention, the Court stated as follows:

> "We are aided here, of course, by the provision of § 20 of the Longshoremen's Act that in proceedings under that Act, jurisdiction is to be 'presumed in the absence of substantial evidence to the contrary' — a provision which applies with equal force to proceedings under the District of Columbia Act. And the Deputy Commissioner's findings as to jurisdiction are entitled to great weight and will be rejected only where there is apparent error. *Davis v. Department of Labor Industries.,* 317 U.S. 249, 256, 257, 87 L.Ed. 246, 250, 251, 53 S.Ct. 225. His conclusion that jurisdiction exists in this case is supported both by the statutory provisions and by the evidence in the record.

> "The jurisdiction by the Deputy Commissioner to consider the claim in this case rests upon the statement in the District of Columbia Act that it 'shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia and the term "employee" shall be held to mean every employee of every such person'." (330 U.S. 474)

The final Supreme Court decision specifically discussing the § 20(a) presumption was *O'Keeffe v. Smith, Hinchman & Grylls Associates,* 380 U.S. 359 (1965). There an employee who was working for an engineering company in South Korea on a 365 day basis drowned while boating on a lake there. In determining whether or not the decedent's work activity was within the coverage of the Act, the Court invoked the presumption and held that if the conditions of employment operated to create a zone of special danger out of which the injury arose, then the employee's work activities were within the ambit of employment and hence covered by the Act.

The Supreme Court has never stated that the presumption found in § 20(a) of the Act is a presumption of compensability, nor has it ever held that there is a presumption of injury. In fact, the statute itself does not state that it is presumed that the *injury* comes within the provisions of the statute nor that the *accident* comes within the provisions of the statute. Rather it simply states that the claim comes within the provisions of the chapter. If it had been the intent of Congress to relieve a claimant of the burden of establishing that his injury was work related or that it was to be presumed that his accident arose out of and in the course of his employment, then Congress would have so stated.

When one views the New York Act at the time Congress lifted these presumptions from it in 1927, how that Act had been in-

terpreted by the New York courts, the thrust of the hearings and testimony as contained in the legislative history, and this Court's continued recognition, as espoused in the foregoing authorities, that the presumption, with the attributes of liberal construction and beneficent purposes, is designed to extend jurisdictional coverage to the longshore industry, it is respectfully submitted that there is no sound legal predicate for concluding that the presumption is one of compensability and injury

II.

CONFLICT WITH DECISIONS FROM OTHER FEDERAL CIRCUITS

Despite the clear Supreme Court precedent limiting the application of the § 20(a) presumption to the question of jurisdictional coverage, all federal appellate courts who have considered this presumption have extended its application to questions of fact will beyond the concept of jurisdictional coverage, at one time or another, with varying interpretations.

The Second Circuit's most recent pronouncement in *Overseas African Construction Corp. v. McMullen,* 500 F.2d 1291 (2d Cir. 1974), returned to the Supreme Court supported view that the presumption contained in § 20 is a presumption of jurisdiction. In earlier cases within that circuit, however, courts had held that the presumption applied to supply the nexus between an accident and the claimant's employment. In *Turner v. Willard,* 155 F.Supp. 352 (D.N.Y. 1956), the court stated:

> "Accordingly, if disability arises in the course of employment, it must be presumed to have arisen therefrom unless there is substantial evidence to the contrary."

The *Turner* formulation of the presumption was adopted in *Nardi v. Willard,* 156 F.Supp. 425 (D.N.Y. 1957), and *John W. McGrath Corp. v. Hughes,* 264 F.2d 314 (2d Cir. 1959), *cert. denied,* 360 U.S. 931 (1959), although that Circuit had earlier

concluded that ". . . the burden to show that the accident was a contributing cause of the death is on the appellee [the claimant]." *Gooding v. Willard,* 209 F.2d 913 (2d Cir. 1954).

The Third Circuit's extension of the presumption in *Marra Brothers v. Cardillo,* 154 F.2d 357, 359 (3d Cir. 1946), was:

> "The language of the section [Section 20(a)] was designed to meet just such fact situations as the one presently before us. We concluded that if it be proved as here that the decedent was employed as a longshoreman and that he met his death in or about a vessel on the navigable waters of the United States and that nothing more is shown, the deputy commissioner must hold that his widow's claim is within the purview of the statute."

In *Marra,* the presumption was applied to establish that the longshoreman's death arose out of and in the course of his employment rather than being due to foul play.

The Fourth Circuit's presumption approach was first outlined in *Furlong v. O'Hearne,* 144 F.Supp. 266 (D.Md. 1956), *aff'd.,* 240 F.2d 958 (4th Cir. 1957), where the Court held that the § 20(a) presumption did not relieve the claimant of the necessity of proving an accidental injury. This was followed in *Sykes v. O'Hearne,* 181 F.Supp. 368 (D.Md. 1960). In *Beasley v. O'Hearne,* 250 F.Supp. 49 (D.Va. 1966), however, the presumption was utilized only to determine the coverage question of whether the injury occurred on navigable waters or on dry land.

More recently in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP,* 583 F.2d 1273 (4th Cir. 1978), *cert. denied,* 440 U.S. 915 (1979), the Fourth Circuit utilized the § 20(a) presumption to conclude that the claimant's emphysema arose out of his employment rather than merely being coincidental thereto.

In the Fifth Circuit, the early cases placed the burden on the claimant of proving that his physical condition was job-related.

Pate Stevedoring Co. v. Henderson, 44 F.Supp. 12 (D.Ala. 1943); *Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963); *Young & Co. v. Shea,* 397 F.2d 185 (5th Cir. 1968), *cert. denied,* 395 U.S. 920 (1969).

The recent opinion in *Eller & Co. v. Golden,* 620 F.2d 71 (5th Cir. 1980), though, has now cast the foregoing into doubt for there the court applied the § 20(a) presumption to the question of whether the worker's subsequently developed infirmities were related to his on-the-job accident. Thus it apparently extended the presumption to a question of causal relationship.

The Seventh Circuit follows the traditional pattern of departure from Supreme Court precedent. In its earliest consideration in *Eschbach v. Contractors, Pacific Naval Airbases,* 181 F.2d 860 (7th Cir. 1950), the Court stated:

> "In the hearing before the deputy commissioner, the burden was on the claimant to prove the facts necessary to sustain his claim other than those facts which § 20 of the Act, 33 U.S.C.A. § 920, provides shall be presumed unless there is substantial evidence to the contrary. The fact as to the causal connection between the employment and the injury is not one which is to be so presumed. The burden was, therefore, on the plaintiff to prove such fact."

In the later case of *Continental Insurance Co. v. Byrne,* 471 F.2d 257 (7th Cir. 1972), *cert. denied,* 406 U.S. 918 (1972), the Court extended the presumption by holding that where there was a doubtful factual question as to whether an injury arose out of and in the course of employment, compensability was presumed.

In the Eighth Circuit case of *Ridgley v. Ceres, Inc.,* 594 F.2d 1175 (8th Cir. 1979), in the context of an admitted on-the-job injury, the presumption was applied to relate a subsequent disabling condition to that accident.

Similarly, in the Ninth Circuit case of *Parsons Corp. v. Director OWCP,* 619 F.2d 38 (1980), the presumption was held applicable to the question of a causal relationship between the claimant's employment and a disabling eye condition, thereby casting into doubt its earlier holdings that the § 20(a) presumption applied to coverage only. *Liberty Mutual Ins. Co. v. Gray,* 137 F.2d 926 (9th Cir. 1943); *Pillsbury v. Liberty Mutual Ins. Co.,* 143 F.2d 807 (9th Cir. 1944); and *O'Leary v. Puget Sound Bridge & Dry Dock Co.,* 349 F.2d 571 (9th Cir. 1965).

The District of Columbia Circuit, even before the present case, adopted views of the § 20(a) presumption which are substantially beyond Supreme Court precedent. In *Hartford Accident & Indemnity Co. v. Cardillo,* 72 U.S. App. D.C. 52 (1940), *cert. denied,* 310 U.S. 649 (1940), the Court held that when an injury occurs during the course of that employment, then the presumption arises that the injury also arose out of employment. Since then that Circuit has on numerous occasions held that when an injury manifest itself during employment, the presumption arises that it arose therefrom. *Travelers Insurance Co. v. Cardillo,* 78 U.S. App. D.C. 255, 140 F.2d 10 (1943); *Robinson v. Bradshaw,* 92 U.S. App. D.C. 216, 206 F.2d 435 (1953), *cert. denied,* 346 U.S. 899 (1953); *Butler v. District Parking Management Co.,* 124 U.S. App. D.C. 195, 363 F.2d. 682 (1966); *Wheatley v. Adler,* 132 U.S. App. D.C. 177, 407 F.2d 307 (1968); *Mitchell v. Woodworth,* 146 U.S. App. D.C. 21, 449 F.2d 1097 (1971).

The District of Columbia Circuit expanded the presumption even further to assist a claimant in establishing whether a subsequently manifested disabling condition arose out of an earlier employment-related injury. *J.V. Vozzolo, Inc. v. Britton,* 126 U.S. App. D.C. 259, 377 F.2d 144 (1967) (whether a second myocardial infarction was related to an earlier job-related heart attack); *Swinton v. J. Frank Kelly, Inc.,* 554 F.2d 1075 (D.C. Cir.), *cert. denied,* 429 U.S. 820 (1976) (whether a back problem which became disabling 11 months later was related to a fall from a truck).

From the foregoing, with the possible exception of the current Second Circuit position, it can be seen that each of the Circuits which has considered the scope of the § 20(a) presumption has erroneously extended it beyond the purpose for which it was intended: to decide questionable cases of jurisdictional coverage. Prior to the instant case, these extensions essentially served to establish the nexus between the accident and the employment or to establish the nexus between the subsequently manifested injury and an accident which was previously established to be employment-related.

Now here we see an even more drastic departure from Supreme Court precedent and Congressional intent by the current holding that no accident need be established nor need any job relationship be shown. All that a worker must do is show that he has a physical ailment, and the burden shifts to the employer to prove a negative: that the malady is not work-related.

The Court's opinion so states:

> "We now hold expressly that where a claimant has been injured, the Act requires that, in the absence of substantial evidence to the contrary, the claimant be given the benefit of a rebuttable presumption that the injury arose out of and in the course of the claimant's employment" 200 U.S. App. D.C. 402, 406, 627 F.2d 455, 459 (1980).

In reaching that conclusion, the Court bootstraps that concept by relying primarily on *Butler v. District Parking Management,* 124 U.S. App. D.C. 195, 363 F.2d 682 (1966); *Wheatley v. Adler,* 132 U.S. App. D.C. 177 407 F.2d 307 (1968); and *Mitchell v. Woodworth,* 146 U.S. App. D.C. 21, 449 F.2d 1097 (1971). Those cases, however, do not support the Court's position.

In each of the three cited cases, the claimant's injury arose during work hours on the employer's premises. In addition, each claimant presented evidence in the form of expert medical

testimony that the conditions from which they were suffering were related to their job. Only then was the § 20(a) presumption indulged in by the Court.

They represent, therefore, the type of presumption extension used to establish that an injury manifesting itself during work hours likewise arose in the course of the claimant's employment, but they in no way, even if correctly decided, justify the elimination of the requirement that the claimant show a causal relation to employment by demonstrating that the conditions of employment contributed to the subsequently manifested disability or that the injury first manifest itself during employment hours. The *Riley* decision, consequently, constitutes a major deviation from all previous extensions of the § 20(a) presumption, which themselves ignored the very limited purpose for which the presumption was written: jurisdictional coverage.

The recent trend away from that fundamental concept by the other circuits coupled with the Districts of Columbia's further ground breaking should be halted by this Honorable Court with a return to the original purpose for which the presumption was passed. It should not be forgotten that the presumption in § 20(a) of the Act remains intact today as originally legislated so that it has not changed — only those who continue to construe it continue to change it.

III

EXPANSION OF THE § 20(a) PRESUMPTION WOULD ADVERSELY AFFECT THE ORDERLY ADMINISTRATION OF THE ACT

The expansion of the role of the § 20(a) presumption, as suggested by the Court of Appeals in this case, is repugnant to the orderly administration of the Act and is likely to result in a significant alteration of the current claims procedure. In order to bring the full impact of this radical departure into focus, it is necessary to examine it in conjunction with the full panoply of a claimant's safeguards which are built into the Act. When this is done, it becomes apparent that the combination of these safeguards and the newly defined role of the presumption would effectively serve to deprive employers of the practical ability to defeat meritless claims.

Pro-claimant principles utilized under the Act include a liberal construction to achieve "its humanitarian nature" and "beneficent purposes," *O'Keeffe v. Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359, 362 (1965); *Friend v. Britton*, 220 F.2d 820 (D.C. Cir.), *cert. denied*, 350 U.S. 836 (1955), with the further benefit that all factual doubts are to be resolved in the injured worker's favor. *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969); *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408 (1932).

Relaxed provisions and interpretations for 30 days written notice of injury to the employer under § 12 of the Act, (including the excusing of a failure in that regard) exist, *Voris v. Eikel*, 346 U.S. 328 (1953); *Hoage v. Employers Liability Assur. Corp.*, 62 U.S. App. D.C. 77, 64 F.2d 715 (1953), *cert. denied*, 290 U.S. 637 (1934), as do statute of limitations requirements purportedly requiring the filing of a claim within one year after the injury in § 13 of the Act. *Intercounty Const. Corp. v. Walter*, 422 U.S. 1 (1975); *Great American Indemnity Co. v. Britton*, 86 U.S. App. D.C. 44, 179 F.2d 60 (1949); *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117 (5th Cir. 1980).

Together, these provisions give greater latitude to claimants the more tenuous the nature of the relationship is between an injury and employment. This results in not only protecting good faith employees whose work-related injuries are questionable, but it also can serve to promote groundless claims in which the relationship to employment is wholly lacking.

Once a compensation claim is actually filed, there is no way for an employer or carrier to defeat it on a summary basis or by any means short of a formal hearing before an Administrative Law Judge. 33 U.S.C. §§ 919(c) and (d). If a claimant does not appear at the formal hearing, there is no ability to obtain a dismissal for failure to prosecute. Thus, not only may a stale claim be viable many years after it arose due to the interplay among §§ 12, 13 and 30 of the Act, but a claimant is protected against having his claim dismissed by his own inaction once it has been filed.

Once a claimant reaches the formal hearing stage, he receives the previously cited judicial benefits that the Act is to be construed liberally and that all doubts are to be resolved in his favor. This policy has been significantly enhanced by another recent errant decision from the District of Columbia Circuit in *Hensley v. Washington Metropolitan Area Transit Authority*, ____ U.S. App. D.C. ____, ____ F.2d ____ (D.C. Cir. No. 79-2552, March 17, 1981), which held that the opinion of a claimant's treating physician [whom he has the unrestrained ability to choose] is to be accorded greater weight in opinions concerning causality than that of an independent medical examiner retained by the employer, even though the latter doctor was credited by the Administrative Law Judge. Another illustration of pro-claimant proclivity by the D.C. Circuit required the employer to come forward with affirmative evidence rather than evidence of a "negative character" to rebut the presumption. *Swinton v. Kelly*, 554 F.2d 1075. 1082 (D.C. Cir.), *cert. denied.* 429 U.S. 820 (1976).

These statutory and judicial pronouncements favoring claimants are buttressed by the fact that a claimant faces no

economic risk in pursuing his claim since his attorney's fees are paid by the employer and carrier if he is successful, and should he somehow lose, he is not obligated to pay any attorney's fee. 33 U.S.C.§ 928.

The net result of the foregoing is that it is virtually impossible for an employee to lose a justified claim, and indeed there are recoveries as well on questionable claims due to the "humanitarian" goal that no valid claim should be denied. The combination of these individual policies, however, with the newly fashioned *Riley* presumption expansion that any medical condition is causally related to an individual's employment in the absence of substantial evidence to the contrary, can only lead to an administrative and judicial distortion of the Act which is absurd in practical application and fundamentally unfair to the employer and carrier.

If the present Court of Appeals ruling is upheld, all the employee need do to assert a cognizable claim is merely to state that he was employed and that he suffers from a medical condition. He need not even have a reasonable belief that the ailment is work-related, nor would a specific event be necessary, and the filing of such a claim could be readily justified on the basis that he wishes to put the employer to its burden of proof. The employer and carrier would then have to establish by substantial evidence that the medical condition was not in any way due to the worker's employment, an onerous and in many cases an insurmountable barrier depending upon the nature of the malady involved.

The practical effect of adopting such a universal presumption of causality for all medical conditions would be to cause a disruption of the orderly administration of the Act, particularly in view of the Act's claimant orientation. Because it costs the employee nothing to file a claim, the filing of countless frivolous claims will be encouraged because of the potential that substantial benefits may be secured due to the failure of the employer to meet a stringent burden of proof, or perhaps the carrier will succumb and settle the case rather than incur the

significant expenses of proceeding to a formal hearing where hearing costs, defense costs and claimant's counsel's fees, if an award is made, loom large.

The expansion of the § 20(a) presumption will also surely result in the Office of Workers' Compensation Programs (OWCP) becoming a forum for health insurance claims wherein the employers and carriers have the option to either pay dubious or non-meritorious claims or incur substantial expenses in obtaining legal, investigative and medical assistance to demonstrate the claim's invalidity. The increase in personnel and resources required by OWCP to process the resultant multitude of claims filed where the employee need not even have a good faith belief that his condition is work related would necessarily be extensive.

Since meritorious claims already enjoy the substantial safeguards previously alluded to, the only type of claim which would be encouraged by interpretation of the presumption in this manner are the marginal ones, plus those which may be fraudulently contrived. It will be the benefit of claimants to conveniently forget non-work related occurrences which might have been responsible for the malady. The instant case, in fact, provides a particularly appropriate example of the fundamental unfairness promoted by such a situation, for here the ALJ expressly found that the claimant gave false testimony as to the happening of the accident allegedly responsible for the injury. Indeed, he even secured the services of a co-worker in his scheme. See Tomlinson, *Workers' Compensation – A License to Steal?* 109 Readers Digest No. 6544, p. 163 (1976); Ahern, *The New Crachdown on Insurance Frauds*, 38 Journal of Insurance No. 4, p. 26 (1977).

The attractiveness of workers' compensation benefits in the District of Columbia is well known among the work force and has been well publicized, for the benefits which equal 2/3 of a worker's average weekly wage are tax free. (E.g. Washington Post, March 9, 1980, page A-1; Wall Street Journal, May 21, 1981, page 26, Appendix A.) Even without expansion of the statutory

presumption, the cost and impact of workers' compensation in the District of Columbia is profound. See, Statement from the American Insurance Association, Appendix B.

For example, the Washington Metropolitan Area Transit Authority (WMATA) has a self-insurance program for its non-construction operations. Its claim cost since fiscal year 1975 rose from $1.6 million to a projected $9.2 million in fiscal year 1980. Out of 6,000 unionized WMATA employees, 2,900 claims are pending. Although WMATA has tried to promote a program designed to reduce claims by awarding prizes to employees not to file, it estimates that three out of five union employees will file for and win benefits in fiscal year 1981. 126 Congressional Record, February 7, 1980, H 746.

Where workers' compensation benefits are currently so attractive that there is a high frequency of claims even when the employee bears the burden of showing a causal relationship between his medical condition and his employment, it can be reasonably seen that elimination of that requirement will certainly open the floodgates for the filing of thousands and thousands of dubious or non-meritorious claims. When you couple the already lenient notice and timely claim filing interpretations under the Act with the Court of Appeals invitation to file, one becomes concerned not only with future claims but also those lurking in the past going back many years that can now be attempted with no need to either have a belief that the problem was work related or a doctor's opinion supporting same.

The Court of Appeals ruling here also serves to change fundamental burden of proof concepts. First of all, it is directly contrary to the provisions of the Administrative Procedure Act which governs these proceedings. 5 U.S.C. § 556; 33 U.S.C. § 919(d). Secondly, presumptions have been justified because one party has greater access to evidence on a particular issue and is, therefore, the logical one to come forward with it. *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978); *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *cert. denied* 395 U.S. 920 (1969).

Yet where a worker suffers from a physical infirmity which does not logically or obviously emanate from his work, he is the party with the greatest access to evidence concerning the origin of the malady. He is the only one aware of the particulars of his daily employment activities and his personal life. He is the only party with knowledge of and immediate access to his entire medical history. In particular, he also has far greater access to his family, friends, and associates in aiding his recollection as to possible causative agents.

To require an employer to explain an idiopathic medical condition where the employer has no knowledge of an employee's personal or medical history is completely repugnant to the concept of allocating the burden of proof to the party with superior access to the information. Furthermore, the effect of the Court of Appeals ruling below requires not only that an employer demonstrate the non-relation of a medical condition to any particular incident advanced by the claimant as causative, but also that the employer must rule out *any* employment related incident and the working environment as either causing or aggravating the medical condition.

To properly meet such a burden, it would be necessary for the employer to prove a negative fact and to rule out each individual employment activity ever engaged in by the claimant to sever the employment connection. Yet the courts are loathe to require the worker to prove a negative such as that he cannot engage in any form of employment. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP,* 592 F.2d 762 (4th Cir. 1979).

Not only would the administration of the Act and the conduct of formal hearings be substantially affected by the new distortion of the presumption, but the effect upon the insurance industry and the business community would likely be devastating Even at the present time, claims expense under the Act to insurers is high, for they must not only pay compensation benefits and medical expenses, but they must also employee intra-office personnel to handle compensation.

Although this concededly is a routine expense of doing business, under the Act the insurer must employ investigators,

defense attorneys, plus medical and vocational rehabilitation experts to properly evaluate and defend controverted claims. Furthermore, if the insurer defends a claim where the claimant prevails on *any* issue, aside from the cost of going to trial, it is also obligated to pay claimant's attorney's fees and expenses, including expert witness fees. 33 U.S.C. § 928.

The District of Columbia workers' compensation law has become notorious for its high costs and these continue to escalate. As of January 1, 1978, for various types of business, District of Columbia workers' compensation insurance premium rates varied from 127% to 431% of their Maryland and Virginia counterparts. From 1973 to 1979, workers' compensation insurance premiums in the District of Columbia have increased in excess of 600%. 126 Congressional Record, February 7, 1980 (H. 745). See also statement from the American Insurance Association, Appendix B. A similar result has occurred to shippers, forcing many to become self-insured. Wall Street Journal, May 21, 1981, page 26, (Appendix A.)

In testimony before the District of Columbia City Council's Committee on Housing and Economic Development, exploring the need for a new Workers' Compensation Act in the District of Columbia, Knox Banner, Executive Director of the Mayor's Office of Business and Economic Development, concluded that from 1970 to 1976, the District lost 108 firms and approximately 15,000 jobs, an estimated loss of $180 million in payroll per year. Mr. Banner stated:

> "One of the most frequently cited disincentives that is presently discouraging business development in the city is the current workers' compensation law . . . as a result of changes in the Act in 1972, District workers now enjoy unnecessarily high compensation benefits, and employers pay unnecessarily high premiums. 126 Congressional Record, February 7, 1980 (H 745)."

The local committee's report found that expenses attendant to procuring workmens' compensation insurance had made many local businesses non-competitive and forced them to leave the

city, plus it had deterred new businesses from locating in it. (Report, Committee on Housing and Economic Development on Bill 3-106, the District of Columbia Workers' Compensation Act of 1979, January 8, 1980, pp. 3, 4.) Difficulties experienced by private employers in the District of Columbia in obtaining voluntary workers' compensation insurance from individual insurance companies were also noted, and statistics from the District of Columbia Department of Insurance reported that in 1975, 568 private employers were insured by the assigned risk pool, whereas by 1978, the number had grown to 24,000. (Committee Report, *supra,* p. 5).

The current high cost to insurers of administering the Longshore Act in the District of Columbia thus demonstrates the already precarious position which employers and insurers are in. With the introduction of additional anticipated claims stemming from the Court of Appeals invitation, this would interpose further burden on an already strained business community and insurance industry.

Since all individuals at some time in their lives experience some need for medical treatment, and may even lose time from work, the potential number of claims in this category is astronomical. In light of the reversed burden of proof concerning an illness and employment, what is to prevent claims being advanced for payment of medical bills or weekly benefits for the common cold, the flu, old age arthritis, indigestion, gout, or any other garden variety medical problem? The § 20(a) presumption, as construed by the *Riley* Court of Appeals, effectively engrafts a health insurance claims rider on a workers' compensation policy contrary to all rhyme, reason, or logic. If we are to have health insurance for workers across the board, then the law should be changed by Congress – not by judicially reading words out of or into a statute at loggerheads with its express terms and prior Supreme Court precedent.

CONCLUSION

For the reasons set forth above, Amicus respectfully urges this Honorable Court to vacate the Court of Appeals' application of the § 20(a) presumption to the facts of this case. The presumption should properly be limited to the issue of jurisdictional coverage, as contemplated by Congress in enacting the Longshoremen's and Harbor Workers' Compensation Act, and as it has been consistently viewed by the Supreme Court.

/s/ JOHN C. DUNCAN, III
Suite 1010
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/872-8411

Attorneys for Amicus Curiae

WILLIAM P. DALE
KURT C. ROMMEL
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

APPENDIX A

Wall Street Journal, May 21, 1981, page 26

LONGSHORE LARGESS

Efforts by the Reagan administration to thresh out a trade policy are being accompanied by the usual warnings about declining U.S. competitiveness abroad. All sorts of presumed problems have been identified, including the prohibition against U.S. companies paying baksheesh.

While we might view some of these claims with skepticism, there is one trade problem that hardly anyone has talked about that is much in need of fixing. A little piece of legislation called the Longshoremen's and Harbor Workers' Compensation Act is making it ever more costly to ship from U.S. ports, thus pricing U.S. companies out of export markets.

The act was passed in 1927 to provide compensation for maritime workers injured on the job but not eligible for state compensation. A fine idea. But since its humble beginnings, the act has been puffed up through judicial rulings and congressional amendments until it now inflicts on affected employers, hands down, the most expensive workman's compensation program in the country.

The law now covers over a million people—not just longshore and harbor workers, either, but those working in shipyards, the pleasure boat industry, summer camps, marinas and even marine museums, among others. And what lucky workers they are.

Consider the following: Workers injured on the job are entitled to 2/3 of their gross wages, up to 200% of national average weekly wages, tax-free. The tax-free goody means of course, that many workers can take home benefit checks which are larger than their regular working wage. And these benefits, once

begun, continue, if the injury is "permanent," if the injured person goes on strike, goes to jail or even goes back to work at full pay. Not bad for starters.

Consider further: Say a hapless worker is hugged to death by a grizzly while hiking through Yellowstone. The surviving spouse collects death benefits until age 70 or remarriage, even though the death was unrelated to work. Payments in both disability and death categories have unlimited cost-of-living adjustments.

The disability itself is diagnosed by a physician of the worker's own choosing—a cozy situation whch can lead to unsavory union practices. A 1976 investigation by the New York Waterfront Commission found that the Longshoremen' Association was shaking down employers by threatening them with avalanches of phony disability claims. Companies either paid up or went under—under a pile of claims.

Skyrocketing benefits have meant skyrocketing expenses. In fact, over the past decade, costs to employers have gone up six times faster than wages. For some shipped items, the cost of handling can add 25% to the wholesale price. The entire arrangement has become so expensive and unpredictable that many insurance companies have simply stopped writing longshore compensation policies. In fact, over the past 10 years, the nation's 16 largest shipyards have all been forced to become self-insured.

Those companies who have passed insurance costs through to clients have found that clients take their business elsewhere—over the border to Mexico or Canada. And why not? Canadian costs, for instance, run about 5 cents per $100 of payroll; in New York, companies pay up to $87 per $100 of payroll.

The Department of Commerce estimates that in 1979 over a billion dollars of U.S. goods were exported via Canada instead of U.S. ports. Thus, as shipping business is diverted to other ports and stevedoring companies fold, there are fewer and fewer shipyards and fewer and fewer jobs.

Help is on the way, however; last week, Senators Don Nichols and Sam Nunn introduced a bill which places a 3% cap on COLA increases, eliminates job-unrelated death benefits, clarifies and limits jurisdiction and junks the unsupervised choice of physicians.

It looks good to us. On June 9, the Senate Labor subcommittee begins hearings on this bill. We hope it looks as good to them.

APPENDIX B

May 21, 1981

John C. Duncan III
McChesney and Pyne, Chartered
Suite 1010
1000 Connecticut Avenue N.W.
Washington, D.C. 20036

RE: U.S. Industries/Federal Sheet Metal Inc., et.al. vs.
Director, OWCP, et.al.
Supreme Court of the United States

Dear Mr. Duncan:

We gave endeavored to develop statistical information regarding the cost of the compensation system as currently administered under the Longshoremen's and Harbor Workers Compensation Act (LHWCA). Data has been provided to us by the National Council on Compensation Insurance, a nationwide data gathering and rate making organization serving the insurance industry. In the relatively short time available we are unable to obtain complete statistical data, and consequently can make only partial estimates. The data that is available, however, shows the actual indemnity and medical losses for employees covered by LHWCA (including D.C. employees) in a policy period April, 1977 to March, 1978 to be at the very least $162 million.

This figure is considerably understated for the following reasons:

(1) Only 41 states are included in this compilation. Some states with notoriously heavy LHWCA exposure, such as New York, New Jersey and Pennsylvania, maintain their own rating organizations and do not report their experience to the National Council;

(2) Claims filed under Longshore coverages that are incidental to other types of risks are not included in this compilation;

(3) Longshore claims outside the District of Columbia have been provided only on a "first and second reporting" basis, thus excluding claims for losses occurring within the period that are expected to be filed in later years;

(4) The actual number of cases reported is close to 12,000 for the policy period. This figure is also substantially understated because "medical only" cases (i.e., those without claim for time lost from work) are excluded; and

(5) The statistics do not include expenses incurred for claims handling and defense.

As further indication of the enormous cost of the current LHWCA system, statistics from the National Council show the average loss per covered Washington, D.C. (LHWCA) employee was approximately $241. This is over three times the national average of approximately $77 per non LHWCA covered employee.

It would be pure speculation on anyone's part to anticipate what effect a presumption that all ailments are compensable would have on this system. However, such a presumption would clearly provide incentive for filing questionable or frivolous claims, would greatly add to the expense of handling such claims, and in most instances employers or their insurers would be unable to overcome such a presumption and benefits would be payable. Under these circumstances it is not unreasonable to expect an increase of hundreds of millions of dollars annually in the cost of this already demonstrably overburdened system.

Very truly yours,

Patrick J. O'Brien
Counsel

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